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# INTRODUCTION

## The State of the Ordinary Family: A Symposium

REGINALD LEAMON ROBINSON<sup>1</sup>

What *is* the state of the ordinary family? To this question answers will vary. They will hinge in part on the tension between “ordinary” and “family.” Let us begin with “family.” Ever evolving, the family is an institution, which—through parents and caregivers—performs key social functions. Through it, ideally, we reproduce children. We socialize them in our values, beliefs, mores, and codes. We regulate sexual practices. We instill work values so that children become productive. We protect our children, who “provid[e] emotional comfort and support for adults.”<sup>2</sup>

Yet, despite this rather structuralist or functionalist view of family,<sup>3</sup> we can also say that the family conditions children, especially through obedience training and rigid physical violence, to subsume their existential identities, to the extent that they will ever be fully recognized by society, within the “dominant patterns of social control.”<sup>4</sup> The family, which stands at the forefront of this subsumption, teaches children the need to work within a social system that largely

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1. Professor of Law, Howard University School of Law, Washington, D.C. B.A., Howard University (Phi Beta Kappa, *magna cum laude*), 1981; M.A., The University of Chicago (Political Science), 1983; Exchange Scholar (Political Science & Economics), Yale University, 1984-85; J.D., The University of Pennsylvania, 1989. Thanks to my research assistant, Ms. Erin Medeiros (class of 2013). Of course, the politics and errata belong exclusively to me.

2. ALLAN G. JOHNSON, *THE BLACKWELL DICTIONARY OF SOCIOLOGY: A USER'S GUIDE TO SOCIOLOGICAL LANGUAGE* 118 (2d ed. 2000) (defining Family).

3. *Id.* at 128 (“In studying family life, . . . a functionalist will think of the family as a social system organized around particular cultural values, such as the importance of nurturing and socializing the young, of providing love and protection for family members, of regulating sexual behavior, of passing on the accumulated wealth of the family, and, of course, of perpetuating the family as a social system.”).

4. *Id.*

benefits non-ordinary humans whether in the United States or elsewhere.<sup>5</sup>

Let us complicate “family” by supplementing it with “ordinary.” By “ordinary,” I refer to “non-elite Asians, blacks, American Indians, Latinos, whites, and women, including immigrants.”<sup>6</sup> In short, we all originate in families. To this extent, “ordinary” really could mean everyone, and I really wanted to gather legal scholars together who would ably critique not just the “ordinary family” but also its current *state*.

In real ways, everything happens in, by, or to families. Historically, children, especially females, were apt to die and suffer horribly at the hands not of marauders or home invading burglars but of their parents.<sup>7</sup> In the context of honor killings, parents usually ordered brothers to kill their sisters who expressed personal liberty or sexual autonomy, which was once killed in the parents, and now perforce must be murdered in the wayward daughter.<sup>8</sup> In America, families produce financiers whose compensatory gambling often requires them to ante up assets of working families, the loss of which led inevitably to the Wall Street collapse. For some scholars, the black family has an unwritten history, one shrouded in secrecy, which suffered from the paternalistic rites that gave masters incestuous access to females, whether children or adults, and which through obedience training and rigid physical violence projected their damaged psyche not from master to slave, but from black parents to their children, some of whom today have known slavery or Jim Crow.

In this way, the *state* of the ordinary family reveals the many stressors and fault lines in America’s social realities, some of which have recently been revealed by the Occupy Movement. As Courtland

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5. See Jürgen Habermas, *The Tasks of a Critical Theory of Society*, in CONTEMPORARY SOCIOLOGICAL THEORY 355, 377 (Craig Calhoun et al. eds., 2d ed. 2007).

6. Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1363 n.9 (2004).

7. See generally LLOYD DEMAUSE, THE EMOTIONAL LIFE OF NATIONS (2002) (“[B]illions of innocent [children] have been routinely murdered”); Lloyd DeMause, The History of Child Abuse, Address Before the National Parenting Conference (Sept. 25, 1997), in 25 J. PSYCHOHISTORY 3 (1998), available at [http://www.psychohistory.com/htm/05\\_history.html](http://www.psychohistory.com/htm/05_history.html) (discussing child abuse around the world).

8. See, e.g., Syed Kamran Mirza, “Honor Killing” Is Absolutely Islamic!, ISLAM WATCH (July 1, 2005), [http://www.islam-watch.org/SyedKamranMirza/honor\\_killing.htm](http://www.islam-watch.org/SyedKamranMirza/honor_killing.htm) (“A 25-year-old Palestinian who hanged his sister with a rope: “I did not kill her, but rather helped her to commit suicide and to carry out the death penalty she sentenced herself to. I did it to wash with her blood the family honor that was violated because of her and in response to the will of society that would not have had any mercy on me if I didn’t . . . Society taught us from childhood that blood is the only solution to wash the honor.”).



*Introduction to the State of the Ordinary Family*

Milloy put it, “[M]ost of the protesters had been born into a nation of prosperity, with low unemployment and a budget surplus, a nation relatively at peace. Now, barely in their 20s, the world has been turned upside down. Because of greed.”<sup>9</sup> As in the *post*-Enron, World.com, and Madoff era, this *post*-ponzi Iraq War and Wall Street America has clearly impacted every family, especially “ordinary” ones.<sup>10</sup> In this *post* world, blacks have fared poorly, experiencing levels of poverty not suffered in seventy years.<sup>11</sup> Referring to the voiceless, increasingly silent and suffering blacks and their families, Bruce Dixon looks at the “creeping privatization of our schools, the continuing gentrification of our urban and suburban communities, and the mass incarceration of our youth . . . and the diversion of resources from health care and good jobs to the war economy and corporate welfare all continue apace in the era of Obama . . . .”<sup>12</sup>

Now consider Newt Gingrich’s racist, or at the very least ignorant, claim that under President Obama, more blacks have entered onto the welfare rolls, suggesting that they would fair better under a white president.<sup>13</sup> Although he accused the President of failing blacks, Gingrich—a historian by training come politician—blithely overlooked why families seek public welfare, and he failed to note whether whites, who already account for the largest number of welfare pay-

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9. Courtland Milloy, *Occupy D.C. Has a Plan: To Stay in the Public’s Face*, WASH. POST, Jan. 18, 2012, at B1.

10. See, e.g., Hope Yen, *Wealth Gap Grows Wider Among Races*, SPOKESMAN-REVIEW (June 26, 2011), <http://www.spokesman.com/stories/2011/jul/26/wealth-gap-grows-wider-among-races/> (“[Hispanic] gains quickly shriveled in the housing bust. After reaching a median wealth of \$18,359 in 2005, the wealth of Hispanics—who derived nearly two-thirds of their net worth from home equity—declined by 66 percent by 2009. Among blacks, who now have the highest unemployment rate at 16.2 percent, household wealth fell 53 percent from \$12,124 to \$5,677.”).

11. See Bruce A. Dixon, *Black America Still Paralyzed, Powerless, Irrelevant: Year 4 of the Obama Era*, BLACK AGENDA REP. (Jan. 18, 2012, 11:08 AM), <http://blackagenda.com/content/black-america-paralyzed-powerless-irrelevant-year-4-obama-era>.

12. *Id.*

13. See Joy-Ann Reid, *Newt Gingrich: “I Will Tell Black People to Demand Paychecks Instead of Food Stamps”*, GRIO (Jan. 5, 2012, 11:34 AM), <http://www.thegrio.com/politics/newt-gingrich-i-will-tell-black-people-to-demand-work-instead-of-welfare.php> (“Gingrich has repeatedly referred to President Barack Obama as a “food stamp president”, and has said he’d tackle black teen unemployment by easing child labor laws so that poor kids can work as janitors in their schools, replacing union workers.”). *But see id.* Reid points out that:

[a] 2009 study found that 1 in 8 Americans, and 1 in 4 children—of all races—received food assistance, in the wake of the 2007 recession. The study found that 28 percent of blacks, 15 percent of Hispanics, and 8 percent of whites, received food assistance that year.

When it comes to total welfare receipts, Whites receive 34 percent of federal food assistance benefits, African-Americans 22 percent, and Hispanics 17 percent, according to the U.S. Department of Agriculture.

*Id.*

ments, have also sought public welfare during Obama's presidency. Whether black or white, Latino or Asian, ordinary families often have a greater need to seek such relief than do elite families. For example, after President Obama took office, he "gave the Wall Street casinos an extra \$15 trillion, quintupling down on the Bush bailout, the most massive transfer of wealth from the poor to the rich in human history. The Obama administration hasn't found a single big bankster or mortgage fraudster to prosecute in three years."<sup>14</sup> Unfortunately, apart from race mucking about black families and their financial needs, Gingrich has been silent about corporate and banker welfare.

Although his words did pander to the lowest elements in the conservative Republican Party, Gingrich's accusation does require us to ask: *what* is the state of the ordinary family? Before Gingrich's cynicism, I wanted to know the *why* about the "what." Are ordinary families suffering a wide range of instabilities because they cannot overcome historical forces? If so, would Moynihan's report apply with equal force to all non-elite families? By implication, are social pathologies, perhaps even those that originated in slavery, Jim Crow, the Know Nothing era, and modern racial and ethnic discrimination, causing ordinary families to implode? Well, if Anthony Giddens, the British sociologist, is correct, human agents and social forces come together dynamically and diachronically to co-create personal experiences and social realities, and if so, then Giddens' *duality of structure*<sup>15</sup> strongly requires us to examine not only context, but also what we do and what we experience, so that we can better understand what human choices and social forces impact the state of ordinary families.<sup>16</sup>

Fortunately, in this Symposium, we have scholars who address a range of social factors that provide some answers to the *what* and *why* questions:

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14. Dixon, *supra* note 11.

15. ANTHONY GIDDENS, *THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION* 25 (1984) (defining "duality of structures" as "the structural properties of social systems are both medium and outcome of the practices they recursively organize. Structure is not 'external' to individuals: as memory traces, and as instantiated in social practices, it is in certain sense more 'internal' than exterior to their activities in a Durkheimian sense. Structure is not to be equated with constraint but is always both constraining and enabling").

16. See Robinson, *supra* note 6, at 1404 (emphasis added) (arguing based on Anthony Giddens' structuration model that "Giddens blends minds, agency, and experience. It is the duality of structure and agency. Within this theory, structure means *rules* and *resources* that exist over time-space by which society, through human action, reproduces itself"). See generally GIDDENS, *supra* note 15 (discussing the methodological implications of structuration theory).

*Introduction to the State of the Ordinary Family*

In *The Long Arm of the Law: Incarceration and the Ordinary Family*, Kimberly L. Alderman examines the effect of the increasing rates of incarceration on families of all races and socioeconomic classes. When families lose the emotional and income support of their imprisoned members, they suffer disruptions. Some families turn to public assistance because primary caregivers must fulfill additional responsibilities, and if they become emotionally burdened, these families might splinter through divorce. Equally disruptive is isolation of the incarcerated family member. The foregoing forms narratives that have been redeployed in popular culture, and posed and reposed cops and criminals, which leads the ordinary family to view the court system with a jaundiced eye. Alderman thus argues that this cynicism allows the ordinary family to project responsibility for the incarceration through which it suffers onto an intrusive state. That intrusion affects ordinary families, who regardless of race and class bond over a common enemy: “a dysfunctional criminal justice system that systematically overpunishes and overincarcerates.”

In *Families of Color in Crisis: Bearing the Crushing Weight of the Financial Market Meltdown*, andré douglas pond cummings argues that the financial meltdown of 2008 disproportionately impacted black families, especially families that were headed by single women, because they had most of their net worth tied to their homes. During the recessionary crisis, the black family lost significant wealth, faced disproportionate foreclosures, and limped along under higher than average unemployment rates. For cummings, this loss confessed a cultural antagonism toward black females, all of which was exacerbated by the mass incarceration of black males. As such, massive losses in net worth and home equity-based wealth dovetails unfortunately with the loss of the financial contributions and perhaps stabilizing forces of black fathers. Looking to Michelle Alexander’s *The New Jim Crow*, cummings argues that mass incarcerations destroy minority communities, one indication of which is the precipitous loss in black net worth, especially in single-female headed households.

In *An Essay on Slavery’s Hidden Legacy: Social Hysteria and Structural Condonation of Incest*, Zanita E. Fenton analyzes how misogyny and racial prejudice allow for the two social, sexual taboos of incest and miscegenation to survive by discussing their existence during slavery in the United States. Ultimately, Fenton critiques the reification of the white male, patriarchal figure who, through appropriate foils like stereotypical sexual notions about black women and the

predations of black males, maintains social order through suppression and at the expense of truth, which is registered by Freud's abandonment of his seduction theory and his clients' post-traumatic stress disorder. By punishing primarily white women and black men for miscegenation, white males were thus free to outrage or to form liaisons with black women. By so doing, all family structures were built upon the privileging of white male sexual prerogatives, all of which flowed down from slavery, through Jim Crow, and perhaps by implication into the present-day. One such implication, according to Fenton, has been legal norms that continue to ratify the white male as father, protector, and property-laden.

In *The "First Family Effect: "Love On Top,"* Lenese C. Herbert writes a post-Civil Rights homage to President Obama and First Lady, Michelle Robinson Obama while, simultaneously, eulogizing "Black Love" for members of Generation Jones, a mini-generation born between 1954 and 1965. For parents of Generation Jones, President and First Lady Obama's marriage represents the perfect hetero-normative "Black Power" pairing, and in the Joneses's imagination, such marriages among their children would bring about the commensurate and exponential uplifting of the black race. Herbert argues, such imagined marriages have not happened. Instead, American's "best and brightest" blacks disregard intra-racial marriages as not the norm, but the exception. Unfortunately, extra-racial coupling, especially for black men and increasingly for black women, has become the norm. Nevertheless, a significant number of "Jonesers," who have ingested but have fallen short of their parents' highest hopes to "uplift the race" through family and progeny, who have remained preternaturally single or extra-rationally paired in their own romantic lives, and who have become suspended in a sort of emotional amber, swell with extraordinary pride with regard to the Obama Family.

In *The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and DREAM Act Failure*, Mariela Olivares argues that the United States government has addressed and ignored the needs of children of color, especially Latinos and immigrants, since the recession. Citing the 2011 report by the PEW Hispanic Center, which shows that more Latino children live in poverty than children of any other racial or ethnic group and that children of immigrant parents suffer substantially higher rates of poverty than children of Latino-American parents, Olivares wonders why the federal government reauthorized the 2009 State Children's and

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Health Insurance Program (“SCHIP”), a program which provides health insurance for families with income that is modest but too high to qualify for Medicaid, and which newly covered some lawful immigrants, but failed to enact the Development, Relief, and Education of Alien Minors (“DREAM”) Act. Both the program and Act would have helped children of Latino families. Although the DREAM Act would have also helped children, the legislation failed in 2010. To explain these different legislative outcomes, Olivares focuses on the labeling and lobbying of each piece of legislation, and on the power that the “undocumented” child had on the legislative process. Olivares concludes that the DREAM Act must also be enacted by Congress and signed by the President in order to further assist children of color living in poverty.

In *Dark Secrets: Obedience Training, Black Parenting, and Reassessing the Origins of Instability in the Black Family Through a Re-Reading of Fox Butterfield’s All God’s Children*, I, while rejecting the oft-cited premise that external and objective social forces like white racism and white structural oppression negatively impact the black family, argue that black parents and caregivers today are causing the instability of the black family because they are deeply and culturally committed to obedience training and rigid physical violence. To test this thesis, I re-examine Butterfield’s *All God’s Children*, finding credible narrative evidence that not simply brutal slavery and terrorizing Jim Crow but ongoing intimate partner violence, child maltreatment, and the destruction of the child’s vitality, spontaneity, and authenticity *a la* Alice Miller were far better explanatory variables for the brutal life and violent times of Willie James Bosket. It is not that slavery and Jim Crow were neutral media into which the Bosket “bad asses” were born. They were not; yet, other black children, especially males, suffered this same social putridity without becoming like the Bosket men. Rather, in keeping with Miller, and indirectly with Arthur Janov and Lloyd DeMause, I argue that obedience training and rigid physical violence are better predictors of the instability of the black family because once a child has become neurotic or, in the worst case, exhibits antisocial personality disorder, he has limited ability to bond, trust, and invest love and nurturing in successive generations.

In *Ordinary People in an Extraordinary Time: The Black Middle-Class in the Age of Obama*, Leland Ware and Theodore J. Davis argue that the black middle-class, which has not received the same scholarly attention as the poor or working black family, has made significant

advances since the 1960s. The black middle-class family has better educated their children. They live in better homes. Despite these gains, the middle-class suffers. The lower middle-class still suffers due to recessionary pressures, including, if not especially, the housing crisis. Black middle-class families lag in net worth vis-à-vis their white counterparts. For example, in 2009, “the wealth ratios between blacks and whites were the largest since the government began publishing this data in the 1980s.” Ultimately, Ware and Davis argue that despite progress and challenges, the continuing problem for the black middle-class has been persistent discrimination and segregation, which restrict public school opportunities and increase racial isolation.

In light of the foregoing essays, this Symposium seeks to analyze the challenges faced by ordinary families in the United States in what some have considered the post-racial era of President Obama’s administration.<sup>17</sup> Some have argued that many of the historical precursors to political inclusion, economic participation, and social acceptance have receded somewhat to the backdrop of what America once was.<sup>18</sup> And if we are looking broadly at all ordinary families, can they now enjoy the stability that has been traditionally associated with white middle-class or elite families? Unfortunately, Asians, blacks, Latinos, Native Americans, whites, and others still face issues like lower rates of marriage, wealth accumulation, employment opportunities, lower education opportunities, depression and suicide, out-of-wedlock pregnancies, higher dropout rates, declining church attendances, ongoing intimate partner violence, drug and alcohol abuse, etc.<sup>19</sup> Are these issues a function of external forces, internal dynam-

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17. See, e.g., Andrew Grant-Thomas, *Does Barack Obama’s Victory Herald a Post-Racial America?*, COLORLINES (Dec. 5, 2008), [http://colorlines.com/archives/2008/12/does\\_barack\\_obamas\\_victory\\_her\\_1.html](http://colorlines.com/archives/2008/12/does_barack_obamas_victory_her_1.html)

18. See Dixon, *supra* note 11 (“Black protest, and black America used to be where the left lived. Black America used to be the visible, beating heart of the American left, in permanent opposition to wars of imperial conquest, to despoiling the environment, to gutting social security and Medicaid. Those days are over.”).

19. See, e.g., Bobbi Bowman, *The (Poor) State of Black Families*, ROOT (Mar. 2, 2010), <http://www.theroot.com/views/poor-state-black-families?page=0,1> (“The likelihood of having a family member with a job declined from 2007 to 2008 for white, black and Hispanic families.”); Cynthia Manalo Rapaido, *Filipino American Educational Leaders in Northern California K-12 Public Schools: Challenges and Opportunities* iii (2011) (unpublished Ed.D dissertation, University of San Francisco), available at <http://repository.usfca.edu/diss/18>. Rapaido states that:

Compared to other Asian ethnic groups, Filipino American people have (a) a lower achievement level for academic success, (b) a lower percentage enrolled in college in the United States, (c) a lower percentage 25–29 years of age graduating with bachelor’s degrees or higher in the United States, and (d) a lower percentage graduating with bachelor’s degrees or higher from California universities. Also, Filipino American people have (a) a lower percentage of their population compared to other racial groups

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ics, or both? Do such issues have clear historical origins? If so, what are they? If they flow out of internal dynamics of the family, what are they, and how are these issues and others affecting the stability of the ordinary family? This Symposium seeks to explore structural and agency, political, sociological, historical, cultural, global, and economic/financial issues as they affect the ordinary family's stability—whether such families are traditional or non-traditional.

Finally, I would like to thank the scholars who responded to my call for papers for this very important Symposium on the *State of the Ordinary Family*. It will be their keen insights, forceful prose, and analytical forays that will ideally urge readers to venture beyond their personal and intellectual comfort, so that they can begin to rethink why ordinary families suffer such poor institutional health. And of course, this Symposium would not be possible without the editors of the *Howard Law Journal*, who patiently and professionally worked with us as we struggled to meet deadlines and to make clear and intelligible our visions on the interpersonal and structural forces that impact the ordinary family. On behalf of the contributing scholars, I roundly thank you.

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pursuing and receiving degrees in education in California, (b) one of the highest rates of suicide ideation, and (c) one of the highest dropout rates in the United States and in California.

*Id.*





# The Long Arm of the Law: Incarceration and the Ordinary Family

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## INTRODUCTION

Incarceration rates in the United States have risen exponentially over the past three decades.<sup>1</sup> While incarceration disproportionately affects racial minorities and men, no race, gender, or class is exempt from the ever-expanding reach of punitive law enforcement measures.<sup>2</sup> Increasing criminal prosecution and incarceration rates are touching more and more ordinary families.<sup>3</sup>

This Article explores how the ordinary family uses popular narratives about the criminal justice system to cope with and reconcile the increasing intrusion of the system into the family experience. Part I discusses rising incarceration rates and demonstrates that incarceration is touching more ordinary families every day. Part II considers

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1. Angela Rudolph, *Building Brighter Futures in CHICAGO*, CORRECTIONS TODAY, Apr. 2007, 38.

2. Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says*, N.Y. TIMES, Feb. 29, 2008, at A14 (showing disproportionate incarceration rates between different race and gender); see also THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA IN 2008, at 3 (2008) (showing increased incarceration rates in general for all groups of people).

3. Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1419 n.9 (2004) (defining ordinary people as "non-elite Asians, blacks, American Indians, Latinos, whites, and women, including immigrants.").

how the ordinary family adopts narratives about the criminal justice system as a means of coping with and reconciling having an incarcerated loved one.<sup>4</sup>

### I. SOMEONE'S FATHER, BROTHER, OR SON

In the last thirty years, incarceration rates in the United States have more than tripled.<sup>5</sup> In 2007, the prison population peaked, with one in one hundred U.S. adults behind bars.<sup>6</sup> Incarceration disproportionately affects minorities, men, and the poor, but no race, gender, or class can escape its increasing pervasiveness.<sup>7</sup>

The exponential increase in incarceration is touching all ordinary families, not just minorities and the socioeconomically disadvantaged.<sup>8</sup> Each of the 1.5 million incarcerated men in America is someone's father, brother, or son.<sup>9</sup> Each of the 105,300 incarcerated women is someone's mother, sister, or daughter.<sup>10</sup> Every year, more people have to deal with the emotional and practical consequences of having a close family member incarcerated.<sup>11</sup>

When a family member is incarcerated, the family unit is disrupted. The state regulates all contact and familial support with incarcerated family members, thereby entering into the once-private family

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4. Patricia Ewick & Susan S. Silbey, *Subversive Stories and Hegemonic Tales: Toward a Sociology of Narrative*, 29 *LAW & SOC'Y REV.* 197, 200 (1995) (“[T]o qualify as a narrative, a particular communication must minimally have three elements or features. First, a narrative relies on some form of selective appropriation of past events and characters. Second, within a narrative the events must be temporally ordered . . . . Third, the events and character must be related to one another and to some overarching structure, often in the context of an opposition or struggle.”).

5. *Key Facts at a Glance, Imprisonment Rate Data Table*, BUREAU OF JUSTICE STATISTICS (last updated Sept. 30, 2011), <http://bjs.ojp.usdoj.gov/content/glance/tables/incrttab.cfm> [hereinafter *BJS Imprisonment Rates*] (showing 139 per 100,000 incarcerated in 1980 and 502 per 100,000 incarcerated in 2009).

6. *Id.* (showing a peak of 506 incarcerated persons per 100,000 in 2007, then a slight decline in 2008-09).

7. Liptak, *supra* note 2 (citing THE PEW CTR. ON THE STATES, *ONE IN 100: BEHIND BARS IN AMERICA IN 2008*, at 3 (2008)) (referring to incarceration rates of 1 in 64 Hispanic adults, 1 in 29 black adults, and 1 in 194 white adults as well as rates of 1 in 54 men and 1 in 580 women, with rates for black women between the ages of 35 and 39 matching the national trend of 1 in 100).

8. *BJS Imprisonment Rates*, *supra* note 5, at *Correctional Population Trends by Race Chart* (indicating that the number of adults of all races in the correctional population increased from 1986-97); see also BRUCE WESTERN, ET AL., *ECONOMIC INEQUALITY AND THE RISE IN U.S. IMPRISONMENT* 5 (Princeton University 2004) (showing an increase in incarceration rates from 1983-99 for men across the three educational categories of “Less than H.S. [Diploma],” “High School or GED,” and “Some College”).

9. U.S. DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, *PRISONERS IN 2009*, at 27 (2010) [hereinafter *PRISONERS IN 2009*].

10. *See id.*

11. *See id.* at 1.

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sphere.<sup>12</sup> The incarcerated family member is unable to contribute financial support to his or her family, and the resources of the remaining family members are strained.<sup>13</sup> Families must increasingly turn to public assistance, further involving the state in family affairs.<sup>14</sup>

The ordinary family is further disrupted by the desocialization of the incarcerated family member from family life.<sup>15</sup> Among parents, the unincarcerated caregiver must assume primary financial and emotional responsibility for children.<sup>16</sup> Many primary caregivers must take on this additional responsibility while they simultaneously cope with the loss of a partner, creating feelings of abandonment and, ultimately, anger.<sup>17</sup> Consequently, there is a high divorce rate among inmates and spouses, further splintering already challenged families.<sup>18</sup>

A devastating domino effect results. Formerly incarcerated people are likely to become reincarcerated without the support of their families.<sup>19</sup> Children of incarcerated parents are more likely to become incarcerated themselves later in life as a direct result of separation from their incarcerated parent.<sup>20</sup> More immediately, the children experience educational, behavioral, and emotional problems, and feelings of loss, anger, and embarrassment.<sup>21</sup> These stressors prompt

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12. Justin Brooks & Kimberly Bahna, *"It's a Family Affair"—The Incarceration of the American Family: Confronting Legal and Social Issues*, 28 U.S.F. L. REV. 271, 274 (1994) (“[A] family is often unable to function as a unit when one of its members is incarcerated. The state regulates the contact and familial support between inmates and their families for the period of incarceration.”).

13. See Sarah Abramowicz, *Rethinking Parental Incarceration*, 82 U. COLO. L. REV. 793, 813 (2011).

14. Brooks & Bahna, *supra* note 12, at 272 (“Finally, society ultimately bears the burden of familial incarceration because . . . their families often become increasingly unstable, and economically dependent on the public assistance system.”).

15. Debra A. Harley, *Vocational Rehabilitation Services for an Offender Population*, J. REHABILITATION, Apr. 1, 1996, at 3 (“[P]risoners are deliberately de-socialized . . . .”) (citations omitted) (quoting C. Skinner, *Overcrowded Prisons: A Nation in Crisis*, CRISIS, 1990, at 18-24).

16. Brooks & Bahna, *supra* note 12, at 282.

17. *Id.* at 283.

18. See *id.*; Ellen Barry, River Ginchild & Doreen Lee, *Legal Issues for Prisoners with Children*, in CHILDREN OF INCARCERATED PARENTS 147, 148 (Katherine Gabel & Denise Johnston eds., 1995) (citation omitted) (“[A] significant number of families fall apart under the strain of the arrest and incarceration of the father, and in these circumstances many wives of prisoners separate from their partners or initiate divorce actions.”).

19. Brooks & Bahna, *supra* note 12, at 285 (“Studies have demonstrated that parolees who return to their families, specifically to a spouse and children, have a better chance of leading productive and law-abiding lives. A system that destroys family ties during incarceration incurs the tremendous societal costs of future crimes.”).

20. See Note, *On Prisoners and Parenting: Preserving the Tie That Binds*, 87 YALE L.J. 1408, 1416 (1978) (“Lack of continuity in parenting of a school-age child can cause academic difficulties and delinquent or criminal behavior.”).

21. See Brooks & Bahna, *supra* note 12, at 281-82.

ordinary families to develop narratives to cope with and reconcile the disordered family structure and the invasion of the state into the once-private family life.<sup>22</sup>

## II. THE MORALITY PLAY

The ordinary family adopts narratives to reconcile the incarceration of loved ones and the corresponding intrusion of the state into family life.<sup>23</sup> Psychologist Robyn Fivush explains:

Narratives are the way in which humans make sense of the world. It is as we create organized, explanatory accounts of actions in the world, which are integrated with subjective thoughts and emotions about those actions and outcomes, that we create meaning from these experiences. Especially in the case of negative and stressful events which create a problem to be solved, the ability to construct a coherent narrative that allows for the expression and regulation of thoughts and emotions may be a critical aspect of meaning making.<sup>24</sup>

Ordinary families' narratives are reflected in popular culture, such as television and movie dramas rooted in realism.<sup>25</sup> These dramas attempt to bring viewers a realistic account of the world by using fictional yet believable characters.<sup>26</sup> They are produced in a manner that makes them feel more "real" by decreasing frame rate,<sup>27</sup> omitting

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22. Families use perceptions of the criminal justice system cultivated through media portrayal when creating narratives to derive meaning from their experiences with the criminal justice system. See Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. OF CRIM. JUST. AND POPULAR CULTURE 1, 1 (1995) ("[A] majority of the United States receive much of their impressions and knowledge of the criminal justice system through the media, especially through entertainment television viewing."); see also *Family Narratives Lab*, EMORY U. PSYCHOL. DEP'T, <http://www.psychology.emory.edu/cognition/fivush/lab/FivushLabWebsite/index.html> (last visited Nov. 11, 2011) ("Narratives . . . are the way in which individuals make sense of their experiences and create meaning, both for themselves and for their families.").

23. Robyn Fivush et al., *Meaning Making in Mothers' and Children's Narratives of Emotional Events*, 16 MEMORY 579, 579 (2008) (citations omitted).

24. *Id.*

25. See *supra* note 22 and accompanying text.

26. See Jason Mittell, *The Wire in the Context of American Television*, JUST TV BLOG (Feb. 9, 2010), <http://justtv.wordpress.com/2010/02/09/the-wire-in-the-context-of-american-television/> (discussing how television show *The Wire* does not incorporate "explicit exposition").

27. Frame rate is the speed with which consecutive images are displayed in a film or television show, usually measured in seconds. The rate of frames displayed per second is a technique used in filmmaking to adjust the speed that movement or action is perceived by the viewer. See M. Armstrong et. al., *High Frame-Rate Television*, BBC (2008), available at <http://www.bbc.co.uk/rd/pubs/whp>.

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artificial exposition,<sup>28</sup> and employing non-professional actors.<sup>29</sup> The popular narratives revealed in realist dramas show the criminal justice system as a morality play, with each actor playing his or her role accordingly.

Law enforcement officers are our misled heroes.<sup>30</sup> They are “incompetent, brutal, and self-aggrandizing.”<sup>31</sup> As a general rule, they are either evil or ineffective.<sup>32</sup> This perception is reflected in the shows *The Shield* and *The Wire*, and in the movie *Training Day*, each of which suggests that police corruption is the norm rather than the exception.<sup>33</sup>

The occasional ethical officer is hamstrung by bureaucracy and politics.<sup>34</sup> One of the earliest examples of this type of character is Harry Callahan of *Dirty Harry*, whose ruthlessness made him effective.<sup>35</sup> Popular narratives suggest that police officers—regardless of

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28. Exposition is a filmmaking technique used to add backstory or explain an important element or event in a character's life. Rather than showing the viewer through a scene, the viewer is given the information through methods such as dialogue, narrative, text, or flashbacks. *Exposition*, ELEMENTS OF CINEMA.COM, <http://www.elementsofcinema.com/screenwriting/exposition.html> (last visited Nov. 11, 2011).

29. See Mittell, *supra* note 26; see also Margaret Talbot, *Stealing Life: The Crusader Behind "The Wire,"* NEW YORKER, Oct. 22, 2007, [http://www.newyorker.com/reporting/2007/10/22/071022fa\\_fact\\_talbot?currentPage=all](http://www.newyorker.com/reporting/2007/10/22/071022fa_fact_talbot?currentPage=all) (“The show's departure from Hollywood formulas may be nowhere more palpable than in its routine use of nonactors to fill the minor roles.”).

30. See Randy Cohen, *Good Cops, Bad Cops . . . and Bad Emmys*, N.Y. TIMES (Sept. 14, 2009, 11:59 PM), <http://ethicist.blogs.nytimes.com/2009/09/14/good-cops-bad-cops-and-bad-emmys/> (“[V]arious police programs [are] . . . built around the Hero Cop. It might be a Hero Cop with a flaw—a drinking problem, a disdain for the rules . . .”); see also Susan Glen, *Naked-Ass Swan Song*, POP MATTERS, <http://www.popmatters.com/tv/reviews/n/nypd-blue.html> (last visited Nov. 1, 2011) (describing the lead detective, Andy Sipowicz, on *NYPD Blue* as “a racist and homophobic jerk you can't help but love”).

31. *Realism*, WIRE FAN (Mar. 10, 2008, 2:30 AM), <http://thewirefans.wordpress.com/2008/03/10/realism/> (“Many officers portrayed on the show are incompetent, brutal, self-aggrandizing, or hamstrung by bureaucracy and politics.”); see also Kevin K. Ho, Comment, “*The Simpsons*” and the Law: Revealing Truth and Justice to the Masses, 10 UCLA ENT. L. REV. 275, 279 (2003) (describing the chief of police on a popular television show, *The Simpsons*, as “plainly incompetent” and “only somewhat concerned”); Joe Rhodes, *Letting Go of All That Grime Is Tougher Than He Thought*, N.Y. TIMES, Sept. 2, 2008, at E1 (discussing Michael Chilkis' portrayal of the “brutal and besieged rouge cop” on television series *The Shield*).

32. See Ho, *supra* note 31, at 279-82; see also Douglas Durden, *It's Corruption as Usual 'Shield' Cops at Their Evil Best in Season Two*, RICHMOND TIMES-DISPATCH, Jan. 4, 2003, at G-4 (“I can't think of another leading character so evil . . . [However, the *Shield's* Officer] Mackey is being out-eviled by his fellow officers.”).

33. See Durden, *supra* note 32; see also Bennett Capers, *Crime, Legitimacy, Our Criminal Network, and the Wire*, 8 OHIO ST. J. CRIM. L. 459, 460 (2011) (“[The cops] are plagued by nepotism and internal corruption”); see also Jon Loevy, *Truth or Consequences: Police “Testilying”*, LITIGATION, no. 3, Spring 2010, at 13, 16 n.3 (describing the movie *Training Day* as “the story of rogue cops on a criminal rampage”).

34. *Realism*, *supra* note 31.

35. See Russell D. Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375, 1413 (2009) (“[Dirty Harry] Callahan is compelled to break the law on the books

whether they are corrupt or of the vigilante type—suffer the “intellectual vanity” of believing they are smarter than criminals.<sup>36</sup>

Criminals are portrayed in two ways: either as victims of their situation, or as bad, evil characters. As main characters, they are victims of their situation.<sup>37</sup> They resort to crime because society has failed them.<sup>38</sup> In instances where criminals are bad or evil, they are not real, three-dimensional people; they are stereotypes completing acts necessary to propel the plot forward.<sup>39</sup> The true villain, both complex and evil, has been retired to superhero films.<sup>40</sup> Popular narratives cast criminals as either nameless thugs, who assault innocent citizens, or as victims of circumstance, resorting to crime because society has failed them. They are then further punished by the police and courts for their misfortune.<sup>41</sup>

The “victims of circumstance” narrative is demonstrated by the main characters of the television shows *Breaking Bad* and *Weeds*.<sup>42</sup> In *Breaking Bad*, a high school chemistry teacher must manufacture methamphetamine in order to pay for medical treatment for his advanced lung cancer.<sup>43</sup> In *Weeds*, a suburban mother is forced to grow

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in order to bring about a more morally satisfying law on the ground . . . *Dirty Harry* spawned a vast army of sequels and other subsequent films that exploited the same basic [vigilante police drama] themes.”).

36. *Creator David Simon on Cutting “The Wire.”* WIRE FAN (Mar. 10, 2008), <http://thewirefans.wordpress.com/category/creator-david-simon-on-cutting-the-wire/> (discussing the character of Detective McNulty, the creator of the television series *The Wire* explains how fans didn’t want to believe that McNulty was acting in an unethical manner). “His intellectual vanity has been on display since the first season.”) *Id.*

37. *See* Susan A. Bandes, *And All the Pieces Matter: Thoughts on the Wire and the Criminal Justice System*, 8 OHIO ST. J. CRIM. L. 435, 444 (2011) (discussing the criminal character D’Angelo Barksdale on *The Wire*). “It is clear that he has been raised to fill a certain role. It is evident that despite his moral qualms and deep unease about that role, he has no real grasp of what other options might be available to him . . . .” *Id.*

38. *See, e.g., The Wire* (HBO 2002-08) (depicting various subplots that focus on individuals who turn to crime when society fails them, such as poor citizens and school-aged children turning to the illegal drug trade because society offers them no acceptable alternative).

39. *See* Bandes, *supra* note 37, at 435 (“[Police shows focus] on good, if sometimes imperfect, cops trying to find the real bad guys—the perpetrators . . . . [They do] not raise disquieting questions about . . . the social and political arrangements that lead to a permanent underclass.”).

40. *See, e.g.,* BATMAN BEGINS (Warner Bros. Pictures 2005) (Ra’s al Ghul); THE DARK KNIGHT (Warner Bros. Pictures 2008) (the Joker); SPIDER-MAN (Sony Pictures Entertainment 2002-07) (the Green Goblin). Complex and evil villains can also be seen in characters such as Bill in KILL BILL (Miramax Films 2003) and Agent Smith in the MATRIX (Warner Bros. Pictures 1999-2003), both of whom mimic the traditional villain role in Westerns and martial arts movies, which lack the realism component prevalent in modern dramas.

41. *See generally* Bandes, *supra* note 37 (discussing characters who are forced to perform criminal activities because of society and then further punished by the law).

42. *Breaking Bad* (AMC 2008-Present); *Weeds* (Showtime 2005-Present).

43. Ginia Bellafante, *Better Living Through Chemistry*, N.Y. TIMES, Mar. 6, 2009, at C1.

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marijuana to keep the family house after her husband suddenly dies.<sup>44</sup> These are normal, arguably blameless people who are in tough situations and have little choice but to resort to criminal activity to protect their families. They are middle-class; they are white; they are ordinary; and they are forgivable. In these particular examples, the crimes are strongly driven by a positive character trait: the desire to take care of one's family. In this way, the ordinary family can respect the characters *for* their crimes, not just in spite of them.

The ordinary family views the court system as inherently dysfunctional.<sup>45</sup> Judges are believed to be presumptively biased against criminal defendants.<sup>46</sup> The Jurors are portrayed as disinterested and ignorant, not truly engaged in the process of finding justice.<sup>47</sup> These elements of dysfunction combine to make the trial process not a search for truth, but instead a formality and mere precursor to incarceration.<sup>48</sup>

Early examples of the dysfunctional criminal justice system narrative include . . . *and Justice for All* and *Presumed Innocent*.<sup>49</sup> In . . . *and Justice for All*, ethical and idealistic defense lawyer Arthur Kirkland has two clients who become victims of the legal system, including a transgender client who commits suicide after being sent to jail for a minor offense.<sup>50</sup> In a dramatic climax, Kirkland erupts in court,

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44. Dave Itzkoff, *Mommy, What's That in Your Purse?*, N.Y. TIMES, July 31, 2005, at 21.

45. Ho, *supra* note 31, at 282-83 ("The emphasis on truth lying outside of the legal system in *The Simpsons* reveals a public distrust of the deliberative process of trial . . ."). Consider also . . . *and Justice for All* (Columbia Pictures 1979) and *Presumed Innocent* (Warner Bros. Pictures 1990), which served as starting points for the popular inquiry into whether the court system is dysfunctional.

46. Susan Bandes, *We Lost It at the Movies: The Rule of Law Goes from Washington to Hollywood and Back Again*, 40 LOY. L.A. L. REV. 621, 627 (2007) ("If [the judge] does have 'character,' this is likely an indication that he is at best temperamentally unsuited for the job, and at worst incompetent, biased, or a criminal.").

47. See Ho, *supra* note 31, at 287 (discussing the portrayal of jurors in the television show *The Simpsons* as bored, burdened, and not taking their duty seriously).

48. Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 125 (2005) ("Indeed, we rarely if ever see the inside of a courtroom in this series [*Law & Order: Criminal Intent*]. It would be unnecessary and redundant after the heroism of the detective has ensured the just outcome to see the anti-climactic acceptance of the inevitable by the jury or judge.").

49. Vincent Canby, *Screen: Al Pacino in '. . .and Justice for All': Sorts of Breakdowns*, N.Y. TIMES (Oct. 19, 1979), <http://movies.nytimes.com/movie/review?res=9B0DE3D71F39F93AA35751C1A965948260> ("'. . .And Justice for All,' pretends to be about the shortcomings in our judicial system . . ."); David A. Kaplan, '*Presumed Innocent*' Tackles a Tough Case, N.Y. TIMES, July 27, 1990, at 29 ("We tried to show how the system works, for good and for bad – that the pursuit of truth and the system of justice may not be the same thing.") (internal citations omitted).

50. . . . AND JUSTICE FOR ALL (Columbia Pictures 1979).

screaming at the judge, “You’re out of order! You’re out of order! The whole trial’s out of order!”<sup>51</sup> *Presumed Innocent* is another such example, wherein a prosecutor is tried for a murder that he ultimately discovers was committed by his wife.<sup>52</sup> Before the case against him is dismissed, however, it is revealed that there is extensive corruption and incompetence in the local criminal justice system.<sup>53</sup>

Narratives have also developed about the law as a codification of a dysfunctional criminal justice system. The war on drugs is viewed as a war on the underclass.<sup>54</sup> Those with power take advantage of those without it; superiors use subordinates as scapegoats, both in the police and criminal communities.<sup>55</sup> Individual actors—be they criminal, cop, or official—are betrayed by the institutions to which they belong. *The Wire* creator David Simon explained, “Whatever institution you as an individual commit to will somehow find a way to betray you . . . .”<sup>56</sup>

The common theme among these narratives is a reinforcement of a deterministic mindset.<sup>57</sup> The police do not know any better; they are products of their institutional and historic environments.<sup>58</sup> The court system is broken; the innocent are imprisoned, and the guilty go free. Criminals are driven to crime by misfortune, and then unfairly treated by the dysfunctional criminal justice system. The institutions are at fault; the individuals are absolved of responsibility; and, norms become both unchangeable and unavoidable. If a suburban widow must sell marijuana to keep her house and a high school teacher must manufacture methamphetamines to fund his cancer treatment, then the

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51. *Id.*

52. *PRESUMED INNOCENT* (Warner Bros. Pictures 1990).

53. *Id.*

54. Ed Burns, David Simon & George Pelecanos, *The Wire’s War on the Drug War*, *TIME* (Mar. 5, 2008), <http://www.time.com/time/magazine/article/0,9171,1720240,00.html> (“And what once began, perhaps, as a battle against dangerous substances long ago transformed itself into a venal war on our underclass.”).

55. *See, e.g., The Wire, supra* note 38 (noting that various episodes portray superiors in the police and criminal contexts using those below them as scapegoats in situations, such as police blaming those below them for major scandals, or criminals going to jail because they refuse to “rat out” those who rank higher in the criminal chain than they do).

56. Alasdair McMillan, *Dramatizing Individuation: Institutions, Assemblages, and The Wire*, *CINEPHILE*, Summer 2008, at 41, 46, available at <http://cinophile.ca/archives/volume-4-post-genre/dramatizing-individuation-institutions-assemblages-and-the-wire/>.

57. Determinism posits that human beings are social constructions, and that their lives and actions are controlled by a social or legal structure that keeps them subjugated. It is often contrasted with the notion of free will. *See* TED HONDERICH, *ON DETERMINISM AND FREEDOM* 36 (2005).

58. *See, e.g., The Shield* (FX 2002-08) (displaying police officers as people who are virtuous in their home lives, however become violent and corrupt when placed in the policing environment).



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world is simply unfair, and crime is the only realistic solution to some of life's problems.<sup>59</sup>

The positive aspect of these narratives is a leveling of the playing field—no longer is incarceration exclusively the purview of racial minorities and the poor. The game has changed from *Minority Men* versus “The Man” to *The Ordinary Family* versus “The Man.” This reflects the broadening incarceration statistics in the U.S. and the fact that having an incarcerated family member is no longer the exception but is instead the norm.

Adopting narratives that legitimize criminal behavior is a natural response to broadening the class of people affected by the systematic unfairness in the criminal justice system.<sup>60</sup> Through these narratives, the ordinary family is able to contextualize and reconcile their experience. Those with an incarcerated family member are no longer being punished because they are subnormal, but instead because they are ordinary. The criminal justice system may legitimize via its intrusion; it tells the ordinary family that they are part of something bigger, and that they matter.

The construct of this morality play also apportions fault among the players, reducing the blame levied on the incarcerated family member.<sup>61</sup> He may have done something criminal, but perhaps like the criminals in *Weeds*, *Breaking Bad*, and *The Wire*, he had no other choice. He may have then been treated unfairly by the police and the court system, much like the defendants in . . . *and Justice for All* and *Presumed Innocent*. He may have been a victim of corruption in law enforcement, subject to the whims of officers like those in *The Shield*, *NYPD Blue*, and *Training Day*. And perhaps his incarceration was inevitable from the start, due to unfortunate circumstances in combination with an unjust legal system.

### CONCLUSION

The narratives adopted by the ordinary family to reconcile rising incarceration rates and the corresponding intrusion of the state into

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59. The television show *Weeds* follows Nancy Botwin, a widow who began selling marijuana in order to support her family after her husband suffered an untimely death. *Weeds* (Showtime 2005-Present). Television show *Breaking Bad* follows high school chemistry teacher, Walter White, who manufactures and sells methamphetamines to provide for his disabled son and expensive cancer treatments. *Breaking Bad* (AMC 2008-Present).

60. See *supra* note 22 and accompanying text.

61. See discussion *supra* Part II.

family life have a common theme of shifting responsibility away from criminals and onto other actors in the narrative, including law enforcement, the court system, and the law itself. These narratives inform the ordinary family that having an incarcerated family member no longer represents marginalization, but is instead a sign that the family is, indeed, ordinary. They further cultivate a common bond that intersects race and class, giving ordinary families a common enemy: a dysfunctional criminal justice system that systematically overpunishes and overincarcerates.

# Families of Color in Crisis: Bearing the Weight of the Financial Market Meltdown

andré douglas pond cummings\*

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## INTRODUCTION

The financial market crisis of 2008 has landed heaviest and hardest upon communities of color.<sup>1</sup> In the minority communities that

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1. See INST. ON RACE & POVERTY, UNIV. MINN. LAW SCH., COMMUNITIES IN CRISIS: RACE AND MORTGAGE LENDING IN THE TWIN CITIES (2009), available at [http://www.irpumn.org/uls/resources/projects/IRP\\_mortgage\\_study\\_Feb\\_11th.pdf](http://www.irpumn.org/uls/resources/projects/IRP_mortgage_study_Feb_11th.pdf) (“Across the United States, people of color continue to receive home loans on worse terms and at a higher cost than similarly situated white borrowers. National research also shows that people who live in segregated communities of color have born the brunt of the mortgage crisis . . . .”); Editorial, *Mortgages and Minorities*, N.Y. TIMES, Dec. 9, 2008, at A34 (“The mortgage crisis that has placed millions of Americans at risk of losing their homes has been especially devastating for black and Hispanic borrowers and their families.”); Michelle Chen, *No End in Sight for Foreclosures in Communities of Color*,

continue to bear the crushing weight of this crisis—which continues unrequited—women of color, and by extension, their families, are by far the group most devastated by the global market meltdown.<sup>2</sup> In an ultimate irony, most economists, scholars, and commentators now agree that the collapse, which continues to ravage Main Street, was caused primarily by a select group of privileged white men—i.e., Wall Street executives, bankers, and the politicians purchased by Wall Street largess.<sup>3</sup> The impact of Wall Street’s fascination with securitizing subprime mortgages, creating worthless collateralized debt obligations, and trading these unregulated exotic instruments recklessly, has been a government bailout of the reckless institutions, absolution of Wall Street banks by the media, and America’s leaders,<sup>4</sup> and a citizenry left adrift. No Main Street bailouts have materialized as American citizens continue to deal with foreclosures, joblessness, and chaos.<sup>5</sup> Those citizens struggling most with foreclosure, joblessness

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HUFFINGTON POST (June 28, 2010, 11:22 AM), [http://www.huffingtonpost.com/michelle-chen/no-end-in-sight-for-forec\\_b\\_626421.html](http://www.huffingtonpost.com/michelle-chen/no-end-in-sight-for-forec_b_626421.html); andré douglas pond cummings, *Economic Crisis Lands Heaviest on Communities of Color*, CORPORATE JUSTICE BLOG (Dec. 4, 2009, 11:04 AM), <http://corporatejusticeblog.blogspot.com/2009/12/economic-crisis-lands-heaviest-on.html> (“Studies indicate that predatory lending and ‘steering’ of prime qualified minority borrowers into subprime loans is one of the root causes of these destructive outcomes reported above. African American and Latino borrowers are somewhere between two and nine times more likely than white borrowers to have high cost mortgages.”); andré douglas pond cummings, *Financial Market Crisis Lands Heaviest on Communities of Color*, CORPORATE JUSTICE BLOG (Aug. 19, 2011, 8:30 AM), <http://corporatejusticeblog.blogspot.com/2011/08/financial-market-crisis-lands-heaviest.html>.

2. See *Greed that Led To Financial Meltdown*, IRISH INDEP., Mar. 22, 2008, at Features; see also RICHARD A. POSNER, *A FAILURE OF CAPITALISM: THE CRISIS OF ‘08 AND THE DESCENT INTO DEPRESSION* (2009); Allan Sloan, *How Financial Madness Overtook Wall Street*, TIME, Sept. 18, 2008, available at <http://www.time.com/time/business/article/0,8599,1842123,00.html> (describing the cause and potential solutions of the financial crisis).

3. andré douglas pond cummings, *Racial Coding and the Financial Market Crisis*, 2011 UTAH L. REV. 141, 203 (2011). See Eric Lichtblau, *G.O.P. Has Potent Ally on Wall St.*, N.Y. TIMES, Aug. 28, 2010, at A1; Matt Taibbi, *Wall Street’s Big Win*, ROLLING STONE, Aug. 4, 2010, available at <http://www.rollingstone.com/politics/news/wall-streets-big-win-20100804>; Nick Carey, *Racial Predatory Loans Fueled US Housing Crisis-Study*, REUTERS (Oct. 4, 2010, 12:00 AM), <http://www.reuters.com/article/idUSN0121481520101004>.

4. However, in America and around the world, people now seem intent on granting Wall Street no quarter, and definitely not absolution. See generally andré douglas pond cummings, *Occupy Wall Street I: Formal Statement*, CORPORATE JUSTICE BLOG (Oct. 17, 2011, 11:00 AM), <http://corporatejusticeblog.blogspot.com/2011/10/formal-statement-occupy-wall-street-ii.html>; Joseph Karl Grant, *Occupy Wall Street V: Diagnosing and Attacking the Symptoms of Our Collective Disease*, CORPORATE JUSTICE BLOG (Oct. 21, 2011, 7:00 AM), <http://corporatejusticeblog.blogspot.com/2011/10/occupy-wall-street-v-diagnosing-and.html>; Cheryl L. Wade, *Occupy Wall Street III: The Diversity of the 99%*, CORPORATE JUSTICE BLOG, (Oct. 19, 2011, 1:31 PM), <http://corporatejusticeblog.blogspot.com/2011/10/occupy-wall-street-diversity-of-99.html> (detailing, collectively, the public’s perception of Wall Street via its participation in the Occupy movement).

5. See andré douglas pond cummings, *Post Racialism?*, 14 IOWA J. GENDER, RACE & JUST. 601, 603 (2011); Sara Hansard, *Bailout Has Been Good for Wall Street, Not Main Street*, DAILY FINANCE (Apr. 20, 2010, 7:00 PM), <http://www.dailyfinance.com/story/bailout-has-been-good-for-wall-street-not-main-street/19447022/>; Devona Walker, *How Ruthless Banks Gutted the*

and chaos are women of color and their families. Women of color and urban families in the years preceding the mortgage crisis were targeted by the lending industry to receive disproportionate percentages of onerous subprime home loans leading to devastating foreclosure rates in urban city centers and an overwhelming drop in median minority wealth.<sup>6</sup> Further, chaos abounds in minority communities because vast percentages of male wage earners, fathers, and sons, are behind bars, simply absent from their communities, imprisoned on a massive scale due to America's War on Drugs.<sup>7</sup>

Much has been written about the causes of the mortgage crisis of 2008.<sup>8</sup> Wide-ranging agreement focuses primary causation for the cri-

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*Black Middle Class and Got Away With it*, ALTERNET (Sep. 4, 2010), <http://www.alternet.org/story/148068/>.

6. See *infra* Part I.B.

7. See *infra* Part II.

8. See *The Disastrous Unexpected Consequences of Private Compensation Reforms: Hearing on Executive Compensation: How Much is Too Much? Before the H. Comm. on Oversight and Gov't Reform*, 111th Cong. (2009) (testimony of William K. Black, Associate Professor of Economics and Law, University of Missouri-Kansas City), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1536513](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1536513); WILLIAM D. COHAN, HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET (2009); FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT (2011) [hereinafter INQUIRY COMM'N]; GARY B. GORTON, SLAPPED BY THE INVISIBLE HAND: THE PANIC OF 2007 1–12 (2010); SIMON JOHNSON & JAMES KWAK, 13 BANKERS: THE WALL STREET TAKEOVER AND THE NEXT FINANCIAL MELTDOWN 3–13 (2010); MICHAEL LEWIS, THE BIG SHORT: INSIDE THE DOOMSDAY MACHINE (2010); ROGER LOWENSTEIN, THE END OF WALL STREET, at xxi–xxv (2010); BETHANY McLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS 4–37 (2010); GRETCHEN MORGENSEN & JOSHUA ROSNER, RECKLESS ENDANGERMENT: HOW OUT-SIZED AMBITION, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON (2011); SCOTT PATTERSON, THE QUANTS: HOW A NEW BREED OF MATH WHIZZES CONQUERED WALL STREET AND NEARLY DESTROYED IT 3, 11–12 (2010); Steven Ramirez, Lawless Capitalism: The Subprime Crisis and the Case for an Economic Rule of Law (forthcoming 2012) (manuscript at introduction) (on file with author); ROBERT SKIDELSKY, KEYNES: THE RETURN OF THE MASTER 3–28 (2009); ANDREW ROSS SORKIN, TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES (2010) (detailing the Lehman Brothers failure from beginning to end); THOMAS SOWELL, THE HOUSING BOOM AND BUST 1–29 (2009); JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY 12–18 (2010); WHAT CAUSED THE FINANCIAL CRISIS (Jeffrey Friedman ed., 2011); Lucian A. Bebchuk et al., *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008*, 27 YALE J. ON REG. 257, 258–61 (2010); Joseph G. Bunn, *A Justified “Assault Upon the Citadel of Privity” and the First Amendment: A Theory of Liability for Investors Seeking Recovery from Credit Rating Agencies*, 2 UNIV. P.R. BUS. L.J. 128, 134–37 (2011); Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL'Y REV. 369, 369–71 (2009); Joseph Karl Grant, *What the Financial Services Industry Puts Together Let No Person Put Asunder: How the Gramm-Leach-Bliley Act Contributed to the 2008–2009 American Capital Markets Crisis*, 73 ALB. L. REV. 371, 373–77 (2010); Kristin N. Johnson, *Things Fall Apart: Regulating the Credit Default Swap Commons*, 82 U. COLO. L. REV. 167, 169–73 (2011); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1359–63 (2010); Tracie R. Porter, *The Field Between Lions and Zebras . . . Evening the Playing Field*

sis on legislative deregulation of the capital markets dating back to the 1970s,<sup>9</sup> a housing bubble that inflated and imploded,<sup>10</sup> and Wall Street's activities and behavior in connection with this deregulation and housing bubble.<sup>11</sup> Legislative deregulation, a housing boom and bust, and Wall Street greed and recklessness nearly collapsed the global economy.<sup>12</sup> Yet, Wall Street executives, national legislators, and most commercial and investment banks responsible for inflating the housing bubble and massively profiting from that bubble prior to the collapse have all mostly escaped the devastation of the mortgage meltdown and now appear either completely recovered or nicely recovering.<sup>13</sup> Conversely, those who continue to suffer crippling unem-

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*Between Lenders and Borrowers: Conflicts of Interest and Legal Obligations in the Residential Mortgage Transaction*, 30 QUINNIPIAC L. REV. (forthcoming 2012); Steven A. Ramirez, *Subprime Bailouts and the Predator State*, 35 DAYTON L. REV. 81, 81–84 (2009); Steven L. Schwarcz, *Markets, Systemic Risk, and the Subprime Mortgage Crisis*, 61 SMU L. REV. 209, 209–14 (2008); Steven L. Schwarcz, *Protecting Financial Markets: Lessons from the Subprime Mortgage Meltdown*, 93 MINN. L. REV. 373, 373–75 (2008); William K. Black, *Those Who Forget the Regulatory Successes of the Past are Condemned to Failure*, 44 ECON. & POL. WKLY., no 13, 2009 at 80-86; cummings, *Racial Coding*, *supra* note 3.

9. See Canova, *supra* note 8; cummings, *Racial Coding*, *supra* note 3, at 158–71.

10. See Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185, 2186-91 (2007); cummings, *Racial Coding*, *supra* note 3, at 172-86; *Foreclosure*, *supra* note 8.

11. See JOHNSON & KWAK, *supra* note 8; SORKIN, *supra* note 8; STIGLITZ, *supra* note 8; cummings, *Racial Coding*, *supra* note 3, at 156–81.

12. See INQUIRY COMM'N, *supra* note 8; cummings *Post Racialism?*, *supra* note 5.

13. See Daniel Costello, *The Drought Is Over (at Least for C.E.O.'s)*, N.Y. TIMES, Apr. 10, 2011, at BU1 (“After shrinking during the 2008-9 recession, paychecks for top American executives are growing again — in many cases, significantly so. Rarely has the view from the corner office seemed so at odds with the view from the street corner. At a time when millions of Americans are trying to hang on to homes and millions more are trying to hang on to jobs, the chief executives of major corporations like 3M, General Electric and Cisco Systems are making as much today as they were before the recession hit . . . Some are making even more.”); DeAnn Durbin, *UAW Chief Assails Pay of Ford CEO*, WASH. POST, Mar. 23, 2011, at A16 (explaining that Ford Motor Company justified its CEO's 2009 salary of \$56.6 million with the reasoning that, his leadership is “widely recognized as extraordinary . . . [and] [h]is compensation reflects Ford's goal of . . . providing appropriate performance-based incentives,” especially considering that Ford earned \$6.6 billion in 2010—its biggest profit in 11 years); Pradnya Joshi, *We Knew They Got Raises. But This?*, N.Y. TIMES, July 3, 2011, at BU1 (highlighting that 2010 gains for CEO compensation at 200 top companies was twenty-three percent, or a median pay of \$10.8 million); Nathaniel Popper, *JPMorgan Profit Rises to \$3.3 Billion; but Losses in the Bank's Credit Card and Retail Units Reflect Difficulty that Consumers Have Paying Their Debts*, L.A. TIMES, Jan. 16, 2010, at B1 (explaining that JPMorgan Chase's earnings, with a “reported net income of \$3.3 billion for the fourth quarter and \$11.7 billion for 2009, or more than double what it made in 2008,” provides a “rough snapshot of the U.S. economy . . .”); Nelson D. Schwartz, *\$10 Million in Pay for Bank of America Chief*, N.Y. TIMES, Feb. 1, 2011, at B5 (stressing that Bank of America, even with its “foreclosure mess and [ ] sagging stock price,” was able to pay its CEO \$10 million, and Goldman Sachs paid its CEO \$13.2 million”); Cal Thomas, *Spreading Wealth the Right Way*, WASH. EXAMINER (Apr. 4, 2011), [http://washingtonexaminer.com/opinion/columnists/2011/04/spreading-wealth-right-way?quicktabs\\_1=0](http://washingtonexaminer.com/opinion/columnists/2011/04/spreading-wealth-right-way?quicktabs_1=0) (arguing that CEOs, like John Lundgren of Stanley-Black & Decker, should not lay off employees when he is taking home more than \$32 million, a 253 percent increase from 2009).

ployment,<sup>14</sup> continuing foreclosure abuse and erratic housing prices,<sup>15</sup> and consequences of a massive taxpayer bailout of Wall Street include the general global public, particularly middle class taxpayers, urban communities, and people of color.<sup>16</sup>

This Essay explores the specific impact the financial market crisis of 2008 has had on families of color, particularly African American

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14. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT SITUATION – SEPTEMBER 2011 (2011) (reporting that, despite an increase in employment by 103,000 jobs in September 2011, 14 million people remained unemployed, and the unemployment rate has remained between 9.0% and 9.2% since April 2011); BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, LNS14000000: LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2011) (showing that the September 2011 unemployment rate was 9.0%, compared to an average of 5.8% average from 2008, or an average of 5.3% from 2001–08).

15. See FEDERAL HOUSING FINANCE AGENCY, OFFICE OF INSPECTOR GENERAL, AUD-2011-004: FHFA'S OVERSIGHT OF FANNIE MAE'S DEFAULT-RELATED LEGAL SERVICES (2011), available at <http://www.fhfaog.gov/Content/Files/AUD-2011-004.pdf> (revealing that Fannie Mae knew about foreclosure abuse as early as 2003); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-649T: MORTGAGE FORECLOSURES – DOCUMENTATION PROBLEMS REVEAL NEED FOR ONGOING REGULATORY OVERSIGHT (2011) (“As of December 2010, an estimated 4.63 percent of the about 50 million first-lien mortgages outstanding nationwide were in some stage of foreclosure—an increase of more than 370 percent since the first quarter of 2006, when 1 percent were in foreclosure.”); Associated Press, *Wells Fargo Agrees to Pay \$85 Million Over Loans*, N.Y. TIMES, July 21, 2011, at B7 (showing that Wells Fargo agreed to pay this settlement for pushing sub-prime mortgages—most of which eventually lead to foreclosures); Gretchen Morgenson, *Home-work Regulators Aren't Doing*, N.Y. TIMES, Apr. 17, 2011, at BU1 (remarking on the sloppiness of the mortgage services industry, including DocX, a rubber-stamp mortgage processing company that allowed its employees to forge or ignore mortgage documents); Craig E. Pollack & Julia F. Lynch, Op-Ed, *Foreclosures Are Killing Us*, N.Y. TIMES, Oct. 3, 2011, at A25 (explaining that the rate of foreclosures in August 2011 rose 33% from July); Nelson D. Schwartz, *Bank's Deal Means More Will Lose Their Homes*, N.Y. TIMES, July 12, 2011, at B1 (explaining how a deal between Bank of America and investors, in which it will rework modifications, will also create a quicker foreclosure process than expected).

16. See DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS 10 (2010), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf> (“African Americans and Latinos are, respectively, 47% and 45% more likely to be facing foreclosure than whites.”); Kenneth J. Cooper, *Home Inequity; Mortgage Mess: Lending to Hispanics, African Americans Has Plunged Since Housing Market Collapsed*, CHI. SUN-TIMES, Feb. 14, 2011, at 2 (explaining that in 2009, compared to 2004, African Americans and Hispanics were able to borrow 62 percent less to buy or refinance homes, whereas the borrowing rate for white borrowers declined by only 17 percent); Ellis Cose, *Eyes on the Next Prize - Economic Equality for All*, WASH. POST, July 10, 2011, at B3 (citing the Center for Responsible Lending, which said that property depreciation related to “foreclosures between 2009 and 2012 would end up costing black communities \$194 billion and Latino communities \$177 billion.”); Danielle Kurtzleben, *Economic Recovery a Longer Struggle for Blacks and Hispanics*, U.S. NEWS & WORLD REP., June 28, 2011 (Pol. & Pol'y) (explaining that while the unemployment gap between whites and African Americans is not new, African Americans, unemployment rate, with only a 0.3% drop from its 16.5% peak, is clearly disproportionate to that of whites—which dropped 1.4% of its 9.4% peak); Renae Merle, *Discrepancies Detailed in Minority Foreclosures; Blacks, Latinos More Likely To Fail than Whites with Same Risk Factors*, WASH. POST, Apr. 28, 2010, at A15 (“[In the District of Columbia area, blacks] were almost 20 percent more likely and Latinos were 90 percent more likely to face foreclosure or have lost their homes than similarly situated white counterparts.”).

families. The Essay begins by detailing the dreadful impact of the financial market crisis of 2008 on communities of color. More than any other group of citizens, minority Americans suffered the crisis burden disproportionately and more harshly than any other because in large percentages minority citizens were predatorily targeted by lenders in the mortgage industry for incredible short term lender profit at the expense of long term needs of the family. Next, this Essay analyzes why communities of color suffered most harshly from the financial market crisis by examining the mass incarceration of men of color and the relationship between financial crises and discriminatory imprisonment. Finally, the Essay concludes.

## I. ECONOMIC DEVASTATION OF FAMILIES OF COLOR BY THE FINANCIAL MARKET CRISIS

The mortgage crisis of 2008 had and continues to have a disproportionately harsh impact on minority families and homeowners. Two of the ways in which minority families have suffered the most in light of the crisis include 1) a significant drop in median wealth and 2) a disproportionate rate of mortgage foreclosures based in part on targeted predatory lending.

### A. Median Wealth

Minority median wealth tumbled following the mortgage crisis. In a 2011 Pew Center Research report, the relative net worth of families signals the devastating impact of the financial market crisis on minority families.<sup>17</sup> Since the mortgage crisis, the gulf in net worth between white and black families has increased dramatically.<sup>18</sup> The Pew report provides a stark reminder that the disparity in wealth between whites, Latinos and African Americans in this country is a nightmarish problem.<sup>19</sup> In the single largest drop since Pew began collecting data in 1984, Latinos saw their median wealth drop sixty-six percent during the financial crisis period of 2005 to 2009, and African

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17. See RAKESH KOCHHAR ET AL., PEW RESEARCH CTR., TWENTY-TO-ONE: WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS (2011), available at <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

18. See *id.*

19. *Id.* (“The median wealth of white households is 20 times that of black households and 18 times that of Hispanic households, according to a Pew Research Center analysis of newly available government data from 2009.”).



Americans fared just about as poorly with a fifty-three percent drop in median wealth during the same period.<sup>20</sup>

This precipitous drop in median wealth for Latinos and African Americans during the period of the financial market crisis of 2008 can be attributed in part to the fact that minority wealth is often tied to home ownership and equity. As a result, minority communities are extremely vulnerable during housing and economic crises.<sup>21</sup> Contrarily, whites are generally in a better position to diversify their assets between home equity, stocks, bonds and other investment alternatives.<sup>22</sup> The housing crisis not only widened the existing wealth gap, as white wealth better weathered the mortgage meltdown based on diversified portfolios, but also saw white families' median wealth drop only sixteen percent because of this diversification.<sup>23</sup> While white family wealth dropped just sixteen percent during the mortgage crisis, both Latino and African American family wealth plunged more than fifty percent. Furthermore, according to the Pew report, almost one-third of Latino and African American households reported zero wealth—having more debt than assets—during the crisis period.<sup>24</sup>

Perhaps the most startling statistic from the recent Pew report is that while whites had an average median wealth of \$113,149 during the mortgage crisis period, African Americans had an average median wealth of only \$5,677 and Latinos had an average median wealth of \$6,325.<sup>25</sup> This disparity is simply alarming. The financial market crisis

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20. *Id.*

21. Michael Powell, *Decades of Gains Vanish for Blacks in Memphis*, N.Y. TIMES, May 31, 2010, at A1 (explaining how African Americans had begun to close the wealth gap with whites, but now, because of the housing crisis and their inability to remain afloat during hard times, that “progress [ ] is being erased”); Michelle Singletary, *Housing Decline Took Some Down a Few Rungs Further*, WASH. POST, July 31, 2011, at G1 (illustrating that minorities, in their quest to accumulate wealth, were merely replicating whites' approaches to becoming wealthy—starting the climb up the economic ladder by placing their wealth in home equity); Merle, *supra* note 16 (quoting Barry Zigas, director of housing policy at the Consumer Federation of America, who explains that minorities cannot “weather a disruption” in a housing crisis because they have “fewer liquid assets to start with”).

22. See Michael A. Fletcher, *Investments Join Racial Divide*, WASH. POST, Feb. 22, 2011, at A10 (remarking that just one in four blacks and one in six Hispanics have stocks or bonds, but half of whites have these investments); Melvin L. Oliver, *The Color of Opportunity; Sub-Prime as a Black Catastrophe*, THE AM. PROSPECT, Oct. 2008, at A9 (showing that, because African Americans have sixty-three percent of their wealth in home equity, subsequent housing crises amounts to significant “wealth stripping”); Sabrina Tavernise, *Recession Study Finds Hispanics Are Hit Hardest*, N.Y. TIMES, July 26, 2011, at A1 (revealing how one-third of whites diversify their assets, compared to just eight percent of Hispanics and nine percent of blacks).

23. KOCHHAR, *supra* note 17.

24. *Id.*

25. *Id.*

exacerbated the median wealth gap, as the years of the financial market crisis show a dramatic drop in minority wealth as well as an awful widening of the wealth gap between whites and minorities. Further, statistics show that besides plummeting median wealth, families of color were foreclosed upon disproportionately more often than white families. Minority families were steered into subprime loans predatorily, at a rate far more frequently than white families.<sup>26</sup>

### B. Foreclosures and Predatory Lending

In minority communities, which have been devastated by foreclosures often brought about by subprime loans predatorily extended, women of color have emerged as those most harshly hit. Urban communities have been eviscerated by the mortgage crisis.<sup>27</sup> Emerging evidence confirms that women of color, who often are the heads-of-household, are being disproportionately foreclosed upon, based primarily on the lopsided number of minority women that were steered into subprime loans, often through devious predatory lending.<sup>28</sup> One report indicates that African American women were 256% more likely to receive a subprime loan than white men.<sup>29</sup>

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26. See Oliver, *supra* note 22.

27. Katie Connolly, *30,000 Queue for Housing Assistance in Atlanta*, BBC NEWS (Aug. 12, 2010), <http://www.bbc.co.uk/news/world-us-canada-10957346> (noting that because of the large numbers of foreclosures, those of lower income status strain to find affordable housing, as evidenced by 30,000 people in a southwest Atlanta suburb lining up to receive public assistance); Bruce Katz, Director, Brookings Metro. Policy Program, *Beyond the Recession: The Great Housing Rebalance*, Address at the Michigan Conference on Affordable Housing (Apr. 13, 2011) (transcript available at [http://www.brookings.edu/~media/Files/rc/speeches/2011/0413\\_housing\\_michigan\\_katz/0413\\_housing\\_michigan\\_katz.pdf](http://www.brookings.edu/~media/Files/rc/speeches/2011/0413_housing_michigan_katz/0413_housing_michigan_katz.pdf)) (explaining that Detroit and Grand Rapids home values have decreased forty-two and twenty-six percent, respectively, since 2005); Keeanga-Yamahtta Taylor, *The Other Housing Crisis*, SOCIALISTWORKER.ORG (Sept. 16, 2010), <http://socialistworker.org/2010/09/16/the-other-housing-crisis> (showing the impact of the housing crisis, including a forty percent increase of evictions in Chicago in 2009 from 2005 levels and that forty percent of eviction notices in urban areas target black women); Shyama Venkateswar, *Women of Color Slammed By Economic Crisis — We Must Strengthen Basic Safety Nets*, ALTERNET (Feb. 25, 2010), [http://www.alternet.org/reproductivejustice/145818/women\\_of\\_color\\_slammed\\_by\\_economic\\_crisis\\_\\_we\\_must\\_strengthen\\_basic\\_safety\\_nets?page=entire](http://www.alternet.org/reproductivejustice/145818/women_of_color_slammed_by_economic_crisis__we_must_strengthen_basic_safety_nets?page=entire) (explaining that women are thirty-two percent more likely to receive sub-prime loans, and black and Latina women, at all income levels, are more likely to receive these loans).

28. Cummings, *Racial Coding*, *supra* note 3, at 177–81; Avis Jones-DeWeever, *Losing Ground: Women and the Foreclosure Crisis*, J. FOR NAT'L COUNCIL JEWISH WOMEN, Summer-Fall 2008, at 20-21, available at [http://www.ncjw.org/media/sum\\_fall08\\_losing\\_ground%20.pdf](http://www.ncjw.org/media/sum_fall08_losing_ground%20.pdf); Peter Brown, *The Unchecked Discriminatory Impact of the Foreclosure Crisis on Minority Families and Communities in the United States*, PERIODIC REV. FOR UNITED NATIONS HUM. RIGHTS COUNCIL (Minnesota Tenants Union), Apr. 13, 2010, available at <http://www.jmls.edu/fairhousingcenter/Minnesota%20Tenants%20Union.pdf>.

29. Ruby Mendenhall, *The Political Economy of Black Housing: From the Housing Crisis of the Great Migrations to the Subprime Mortgage Crisis*, BLACK SCHOLAR, Mar. 22, 2010, available at <http://www.thefreelibrary.com/The+political+economy+of+black+housing%3A+from+the+>

Predatory lending occurs when a lender deceptively convinces borrowers to agree to unfair and abusive loan terms, or systematically violates terms in ways that are difficult for a borrower to defend against.<sup>30</sup> Subprime loans are those loans most likely to be written through predatory lending practices to borrowers who do not meet prime underwriting borrower guidelines, and lenders prefer these loans because profit margins can be significantly higher if a borrower pays out the loan.<sup>31</sup> Subprime mortgages typically are written for borrowers who are adjudged to have very high credit risk, often because they lack a strong credit or work history or have other characteristics that are associated with strong probabilities of default.<sup>32</sup> Subprime loans typically carry much higher interest rates than conventional loans.<sup>33</sup>

It is now well established that predatory lending was a primary driver of the financial market crisis.<sup>34</sup> Mortgage brokers, seeking higher origination fees and profit spreads, fervently sought out borrowers to whom they could sell subprime mortgages.<sup>35</sup> Most often, minority communities were targeted for these predatory loans.<sup>36</sup> In

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Housing+crisis+of. . .a0224711356. Additional empirical research must be conducted to determine why women of color were so agreeable to these onerous loan terms, which is beyond the scope of this particular Essay.

30. See *Predatory Lending*, INVESTORDICTIONARY.COM, <http://www.investordictionary.com/definition/predatory-lending> (last visited Mar. 17, 2012).

31. See *Glossary of Mortgage Loan Terms*, FIN. WEB, <http://www.finweb.com/mortgage/glossary-of-mortgage-loan-terms.html> (last visited Mar. 16, 2012).

32. Ben Bernanke, Chairman, Bd. of Governors of the Fed. Reserve Sys., Speech at the Federal Reserve Bank of Chicago's 43rd Annual Conference on Bank Structure and Competition: The Subprime Mortgage Market (May 17, 2007), available at <http://www.federalreserve.gov/newsevents/speech/bernanke20070517a.htm>

33. Carol Leonnig, *How HUD Mortgage Policy Fed the Crisis*, WASH. POST, June 10, 2008, at A1.

34. See Gretchen Morgenson, *Countrywide Suit Settled; Homeowners to Get Aid*, SEATTLE TIMES (Oct. 6, 2008), [http://seattletimes.nwsourc.com/html/nationworld/2008231492\\_mortgages06.html](http://seattletimes.nwsourc.com/html/nationworld/2008231492_mortgages06.html); Tami Luhby, *Predatory Lending Lawsuits on the Rise*, CNNMONEY (Oct. 9, 2009, 7:19 AM), [http://money.cnn.com/2009/10/08/news/economy/Predatory\\_lending\\_lawsuits\\_increase/index.htm](http://money.cnn.com/2009/10/08/news/economy/Predatory_lending_lawsuits_increase/index.htm); *States Are Pondering Fraud Suits Against Banks*, N.Y. TIMES DEALBOOK (Nov. 3, 2009, 3:45 AM), <http://dealbook.blogs.nytimes.com/2009/11/03/states-are-pondering-fraud-suits-against-banks/?scp=11&sq=predatory%20lending&st=cse>; Peterson, *Predatory*, *supra* note 10, at 2189.

35. See *The Downturn in Facts and Figures*, BBC NEWS, <http://news.bbc.co.uk/2/hi/business/7073131.stm> (last updated Nov. 21, 2007, 8:07 AM); *Brokers, Bankers Play Subprime Blame Game*, MSNBC.COM (May 22, 2007, 3:12 PM), <http://www.msnbc.msn.com/id/18804054/>.

36. See Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 171–82 (2010) (illustrating the different methods used to market predatory loans in minority communities). Professor Cheryl Wade at St. John's Law School is currently doing groundbreaking empirical work preliminarily finding that predatory lenders specifically targeted the African American community through its churches and church leaders convincing many to enter destructive loans,

2006, fifty-five percent of loans to African Americans were subprime, despite the fact that many of those borrowers qualified for prime loans.<sup>37</sup> Additionally, statistics indicate that forty percent of loans to Latinos were subprime and thirty-five percent of loans to American Indians were subprime; however, just twenty-three percent of loans to whites were subprime.<sup>38</sup> Women also received less favorable loan terms across equal presentations of credit worthiness.<sup>39</sup>

Studies indicate that minority borrowers were purposely steered into risky and expensive subprime loans, despite being qualified for better terms.<sup>40</sup> Those lenders who steered minority borrowers into subprime loans were often mortgage brokers who were eager to capitalize on significantly larger profits.<sup>41</sup> For instance, “[i]n two audit studies wherein creditworthy testers approached subprime lenders, whites were more likely to be referred to the lenders’ prime borrowing division than were similar black applicants. Further, subprime lenders quoted the black applicants very high rates, fees, and closing costs not correlated with risk.”<sup>42</sup> Because minority communities and borrowers were targeted predatorily for subprime loans, foreclosures have devastated urban communities and their families.<sup>43</sup>

Additionally, recent evidence indicates that women of color received significantly higher interest rates than white men on precisely the same loan terms and credit scores.<sup>44</sup> Further, unemployment is devastating urban city centers as women of color are facing jobless-

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in a kind of affinity fraud. See Cheryl Wade, Speech at the Mid-Atlantic People of Color Conference, Howard University School of Law (January 2012).

37. *Mortgages and Minorities*, *supra* note 1.

38. *Id.*

39. *Id.*

40. See Johnson, *The Magic*, *supra* note 36.

41. See *Mortgages and Minorities*, *supra* note 1; Johnson, *The Magic*, *supra* note 36, at 176–82.

42. Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOC. 181, 190 (2008), available at [http://www.princeton.edu/~pager/annualreview\\_discrimination.pdf](http://www.princeton.edu/~pager/annualreview_discrimination.pdf).

43. See Devona Walker, *How Ruthless Banks Guted the Black Middle Class and Got Away With It*, ALTERNET (Sept. 4, 2010), <http://www.alternet.org/story/148068/>; see also Chen, *supra* note 1.

44. John Leland, *Baltimore Finds Subprime Crisis Snags Women*, N.Y. TIMES, Jan. 15, 2008, at A1.

ness at rates significantly more injurious than are white males.<sup>45</sup> The impact of this reality on the black family has been staggering.<sup>46</sup>

Of course, one of the primary reasons that the financial market crisis has hit women of color and their families so hard, notwithstanding predatory lending and subprime loan abuse, is that the African American and Latino family has been dramatically disrupted in the past twenty-five years. Because America massively incarcerates its minority male citizens, women of color as heads-of-household have become routine in minority communities. Hundreds of thousands of male wage earners have literally been removed from minority communities and placed into jails and prisons throughout the nation. The United States has adopted as official policy, a drug war that incarcerates men of color at unprecedented rates and percentages that exceed any other country in the world.

## II. MASS INCARCERATION

One of the primary reasons that the minority family, particularly families headed by women, has been crushed by the market crisis is that since the 1970s, America has waged a campaign intent on imprisoning, in overwhelming numbers, African American and Latino men.<sup>47</sup> Since 1980, the rate of incarcerated Americans has skyrocketed.<sup>48</sup> The United States has increased its incarceration rate in the

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45. Megan Carpentier, *Jobless Numbers Show No Evidence of a Post-Racial America*, WASH. INDEP., Apr. 6, 2010, available at <http://washingtonindependent.com/81420/jobless-numbers-show-no-evidence-of-a-post-racial-america>.

46. See generally AMERICAN CASINO (Table Rock Films 2009) (describing how the Wall Street meltdown has affected the working class); Editorial, *Fair Lending and Accountability*, N.Y. TIMES, Sept. 8, 2011, at A28. The New York Times Editorial states:

Pricing discrimination—illegally charging minority customers more for loans and other services than similarly qualified whites are charged—is a longstanding problem. It grew to outrageous proportions during the bubble years. Studies by consumer advocates found that large numbers of minority borrowers who were eligible for affordable, traditional loans were routinely steered toward ruinously priced subprime loans that they would never be able to repay.

*Id.*; MIKE HUDSON, A “FORECLOSURE CAPITAL” IN THE SHADOW OF THE NATION’S CAPITAL, CTR. FOR RESPONSIBLE LENDING (2010), available at <http://www.responsiblelending.org/mortgage-lending/research-analysis/Foreclosure-Capital.pdf> (evidencing the plight of Louise Golden, an elderly African American woman, who was wrangled into an ARM loan, and saw her manageable mortgage go from \$1,000 per month to an unmanageable \$1,700 per month); *Median Wealth for Single Black Women: \$100, Single Hispanic Women: \$120, Single White Women: \$41,000* (DEMOCRACY NOW television broadcast Mar. 12, 2010), available at [http://www.democracynow.org/2010/3/12/study\\_median\\_wealth\\_for\\_single\\_black](http://www.democracynow.org/2010/3/12/study_median_wealth_for_single_black) (highlighting that, in general, job creation will not specifically address wealth disparities in communities of color).

47. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 4-8 (2010).

48. See *id.*; see also BUREAU OF JUST. STATISTICS, U.S. DEPT. OF JUST., *Adult Correctional Populations, 1980–2009*, KEY FACTS AT A GLANCE (2010) (showing a combined jail and prison

last thirty years by an incredible 335%.<sup>49</sup> Since 1980, imprisonment for drug crimes alone has increased an astonishing 1,412%.<sup>50</sup> The United States now imprisons more of its citizens than any other nation on Earth.<sup>51</sup> Despite its relatively small population size when compared to other nations globally, Americans are imprisoned at rates that far exceed any other country.<sup>52</sup> “The United States has less than 5 percent of the world’s population. But it has almost a quarter of the

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population of 501,886 people in 1980, as compared to 2,284,913 inmates in 2009), available at <http://bjs.ojp.usdoj.gov/content/glance/corr2.cfm>; Adam M. Gershowitz, *An Informational Approach to the Mass Imprisonment Problem*, 40 ARIZ. ST. L.J. 47, 53 (2008) (highlighting that, in 2005, the rate of incarceration was 738 inmates per 100,000 people, more than doubling the 313 inmates per 100,000 in 1985); Margo Schlanger, *Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421, 1424 (2010) (remarking that, since 1981, the “population explosion in prison and jails” has been the most significant change in American corrections); Vicki Waye & Paul Marcus, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds, Part 2*, 18 TUL. J. INT’L & COMP. L. 335, 373 (2010) (noting that the incarceration rate has increased seven-fold since the “War on Drugs,” and drug offense incarcerations has increased 1200% since 1980). See generally VINCENT SCHIRALDI & JASON ZIEDENBERG, *THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM*, JUST. POL’Y INST. (2000), available at [http://www.justicepolicy.org/images/upload/00-05\\_REP\\_PunishingDecade\\_AC.pdf](http://www.justicepolicy.org/images/upload/00-05_REP_PunishingDecade_AC.pdf) (documenting the significant spike in the number of inmates during the 1980’s and 90’s and noting the disproportionate impact of this spike in the incarceration rate among minorities).

49. See sources cited *supra* note 48; see also AMANDA PETTERUTI ET AL., *PRUNING PRISONS: HOW CUTTING CORRECTIONS CAN SAVE MONEY AND PROTECT PUBLIC SAFETY*, JUST. POL’Y INST. (2009), available at [http://www.justicepolicy.org/uploads/justicepolicy/documents/09\\_05\\_rep\\_pruningprisons\\_ac\\_ps.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/09_05_rep_pruningprisons_ac_ps.pdf).

50. See AMANDA PETTERUTI, *FINDING DIRECTION: EXPANDING CRIMINAL JUSTICE OPTIONS BY CONSIDERING POLICIES OF OTHER NATIONS*, JUST. POL’Y INST. (2011), available at <http://www.justicepolicy.org/research/2322>.

51. ROY WALMSLEY, INT’L CTR. FOR PRISON STUDIES, *WORLD PRISON POPULATION LIST* (8th ed. 2009), available at [http://www.prisonstudies.org/info/downloads/wpp1-8th\\_41.pdf](http://www.prisonstudies.org/info/downloads/wpp1-8th_41.pdf) (emphasizing that the United States, with 2,293,157 prisoners, ranks first in the world above China’s 1,565,771 sentenced prisoners); THE SENTENCING PROJECT, *FACTS ABOUT PRISONS AND PRISONERS* (2012), available at [http://www.sentencingproject.org/doc/publications/publications/inc\\_facts>AboutPrisons\\_Jan2012.pdf](http://www.sentencingproject.org/doc/publications/publications/inc_facts>AboutPrisons_Jan2012.pdf) (showing that the United States, in 2010, with 731 inmates per 100,000, has the highest incarceration rate in the world); *World Prison Brief: Prison Population Totals*, INTERNATIONAL CENTRE FOR PRISON STUDIES, [http://www.prisonstudies.org/info/worldbrief/wpb\\_stats.php](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php) (select “Entire World” in first pull-down box, and then “Prison population totals” in the second pull-down box) (ranking the United States first in the world with 2,292,133 prisoners, almost 650,000 more than second-ranked China; cf. Robert D. Crutchfield & David Pettinicchio, “Cultures of Inequality”: *Ethnicity, Immigration, Social Welfare, and Imprisonment*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 134, 140, 141 (2009) (showing that in a limited study of fifteen nations, the United States incarcerates more minorities, almost sixty percent, than any other nation).

52. See sources cited *supra* note 48. Somewhat shockingly, China, Russia and Iran, nations with highly repressive governments, imprison their citizens at rates that are significantly lower than the United States, while other Western countries imprison at rates dramatically lower than the U.S. ALEXANDER, *supra* note 47, at 6. The U.S. imprisons more of its’ citizens than known communist and other hard-line regimes. *Id.* “Although crime rates in the United States have not been markedly higher than those of other Western countries, the rate of incarceration has soared in the United States while it has remained stable or declined in other countries.” *Id.* at 7.

world's prisoners."<sup>53</sup> The vast majority of prisoner increase in the U.S. has been that of African American and Latino male citizens.<sup>54</sup> "The United States imprisons a larger percentage of its black population than South Africa did at the height of apartheid."<sup>55</sup>

Professor Michelle Alexander author of *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, endeavors to address this unconscionable explosion in prison population by examining America's continuing subordination of its black and brown citizens.<sup>56</sup> Alexander boldly traces the "Southern Strategy" of the Richard Nixon era to the racial coding of the Ronald Reagan and George Bush, Sr. era, through Bill Clinton's "New Democrat" era and concludes that these eras of divisive racial politics and "tough on crime" rhetoric led to a new era of subordination just as nefarious as slavery and Jim Crow.<sup>57</sup> The War on Drugs allows racial subordination without explicitly naming race. Mass incarceration of African Americans and Latinos based almost entirely upon soft drug crimes allows the United States to deprive minority citizens—men in particular—of their constitutional rights, while appearing race neutral.<sup>58</sup>

As a result, this War on Drugs has overwhelmed the black community.<sup>59</sup> With prisons literally teeming with minority prisoners, some have argued that current U.S. incarceration is similar to the impact of slavery upon early American society, as the "focused machinery of the 'war on drugs'" and its disparate impact on African-American prisoners "fractures families[,] . . . destroys individual lives[,] and destabilizes whole communities."<sup>60</sup> To wit, "current drug policies and

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53. Adam Liptak, *Inmate Count In U.S. Dwarfs Other Nations*, N.Y. TIMES, Apr. 23, 2008, at A1.

54. See ALEXANDER, *supra* note 47, at 5–6.

55. *Id.* at 6.

56. See *id.* at 11–15 ("A human rights nightmare is occurring on our watch.").

57. *Id.* at 40–56.

58. *Id.* at 56–59 ("Ninety percent of those admitted to prison for drug offenses in many states were black and Latino, yet the mass incarceration of communities of color was explained in race-neutral terms, an adaptation to the needs and the demands of the current political climate.").

59. See generally *id.*

60. See Drug Policy Alliance, *The U.S. War on Drugs: Political Economics of a New Slavery*, [http://web.archive.org/web/20110413064123/http://www.drugpolicy.org/about/position/race\\_paper\\_econ.cfm](http://web.archive.org/web/20110413064123/http://www.drugpolicy.org/about/position/race_paper_econ.cfm); see also Public Enemy, *Black Steel in the Hour of Chaos*, on IT TAKES A NATION OF MILLIONS TO HOLD US BACK (Def Jam Records 1988), available at <http://www.islanddefjam.com/idjtv/channels.aspx?plid=23285221001&v=1612704422&labelID=75>. Public Enemy rhymes:

They got me rottin' in the time that I'm servin';  
Tellin' you what happened the same time they're throwin';  
Four of us packed in a cell like slaves—oh well;  
The same motherfucker got us livin' in his hell;  
You have to realize, that it's a form of slavery

regulations have direct and devastating impacts on family structure and particularly impact women and children.”<sup>61</sup>

Clear collateral damage of the War on Drugs is the black family. With so many men of color serving out prison sentences for soft drug “crimes,” women and children in urban city centers are forced to work and live exclusive of their fathers, sons and partners. It is no wonder then, that when a housing market collapses, the brunt of the consequences falls hardest and heaviest on those mothers and children.

Not only will millions of people lose their home and family wealth but neighborhoods will be decimated and tens of millions of other homeowners will see their home values decline precipitously,” says Julia Gordon, senior policy counsel at the Center for Responsible Lending. “A disproportionate percentage of subprime loans are made in low-income neighborhoods. Black and Latino communities were especially hard-hit by the foreclosure crisis, which has wiped out the asset base in many neighborhoods across the country.”

In fact, a study by United for a Fair Economy examining housing and racial bias found the subprime-lending mess has caused the greatest loss of wealth to Blacks and Latinos in modern U.S. history. During the past eight years, Black borrowers have lost between \$72 billion and \$93 billion from subprime loans, while Latino borrowers have lost between \$76 billion and \$98 billion during that same time period, according to the report.<sup>62</sup>

This loss is exacerbated by the literal absence of scores of minority men in those urban communities most harshly hit by the financial crisis. Much has been written about the genuine loss suffered by families of color based on massive imprisonment in urban communities.<sup>63</sup>

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organized; Under a swarm of devils, straight up—word ‘em up on the level; The reasons are several, most of them federal.

*Id.*

61. Birtney Mazza, *Women and the Prison Industrial Complex: The Criminalization of Gender, Race and Class in the “War on Drugs.”* 5 *DIALOGUES@RU* 79, 85 (2006), available at [http://dialogues.rutgers.edu/about-the-journal/student-research-papers/cat\\_view/12-volume-v](http://dialogues.rutgers.edu/about-the-journal/student-research-papers/cat_view/12-volume-v).

62. Sam Ali, Luke Visconti & Barbara Frankel, *How Goldman Sachs Hurt Black, Latino, Female Households*, *DIVERSITY INC. MAG.*, May 2010, available at <http://www.diversityincdigital.com/diversityincmedia/201005#pg50>.

63. See generally DONALD BRAMAN, *DOING TIME ON THE OUTSIDE: INCARCERATION AND FAMILY LIFE IN URBAN AMERICA* 89–96 (2004) (detailing how incarceration deeply effects family structure); BRUCE WESTERN, *PUNISHMENT AND INEQUALITY IN AMERICA* (2006) (discussing the relationships among crime, imprisonment, and inequality); *INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT* (Marc Mauer & Meda Chesney-Lind eds., 2002) (analyzing the wide-ranging consequences of mass incarceration); ANNE M. NURSE, *FATHERHOOD ARRESTED: PARENTING FROM WITHIN THE JUVENILE JUSTICE SYSTEM* (2002) (detailing the difficulties of parenting while in prison and on parole); Velma LaPoint, *Prison’s Effect on the African-American Community*, 34 *HOW. L.J.* 537 (1991) (discussing the stresses and challenges of incarceration on the African American family and community); Tracey L. Meares,



The fallout from the financial market crisis of 2008 simply adds insult to injury: evaporation of minority wealth, disproportionate foreclosure based on predatory lending, and unemployment visited on those families that remain in our nation's city centers, while their husbands, fathers, brothers, and sons sit in prison.

## CONCLUSION

In light of the 2008 collapse of the mortgage industry and global capital markets, the concomitant carnage that envelopes minority communities in the United States flows inexorably from America's mass incarceration policies. This period of mass incarceration must come to a close. One condition precedent to gnawing wealth disparities and financial crises devastating urban communities is the massive imprisonment of men of color, wage earners, in American cities. As argued by Professor Alexander, mass incarceration is the civil rights issue of our generation.<sup>64</sup>

The financial market crisis has revealed a deep-seated cultural antagonism toward women of color, and by implication families of color. When faced with the bleakest economic crisis since the Great Depression, white male Wall Street executives and bankers are not held responsible for their recklessness.<sup>65</sup> Instead, black and Latina female

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*Mass Incarceration: Who Pays the Price for Criminal Offending?*, 3 CRIMINOLOGY & PUB. POL'Y 295, 297–300 (2004), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1521&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1521&context=fss_papers) (explaining the negative effects that accompany the massive increase in American incarceration); Bruce Western & Christopher Wildeman, *The Moynihan Report Revisited: Lessons and Reflections After Four Decades: The Black Family and Mass Incarceration*, 621 ANNALS AM. ACAD. POL. & SOC. SCI. 221 (2009) (discussing the Moynihan report and the effects of mass incarceration on the African American family).

64. See ALEXANDER, *supra* note 47.

65. See Tomoeh Murakami Tse, *Perks Unchecked for Some Wall Street CEOs; Bailouts, public anger have not stopped firms from boosting rewards*, WASH. POST, May 23, 2010, at G01; Carol E. Lee, *Obama Blasts 'Reckless' Wall Street*, POLITICO, Dec. 12, 2009, available at <http://www.politico.com/news/stories/1209/30500.html>. But see Michael Daly, *The Face of Anger; The Wall Street protestors are being called 21st-century hippies. But their growing outrage is real—and they look a lot like the rest of us*, NEWSWEEK, Oct. 24, 2011, at 4, available at <http://www.thedailybeast.com/newsweek/2011/10/16/occupy-wall-st-protesters-are-us.html> (explaining that the American people, evidenced by Occupy Wall Street, when seeing that the “reckless financiers [who] trigger[ed] a brutally harsh economic crisis, accept[ed] a government bailout, and then [went] on to become even richer while everybody else has been left to struggle,” have simply “had enough”); Michael Hiltzik, *Can Occupy Wall Street Turn Protests into Policy Changes?*, L.A. TIMES, Oct. 12, 2011, at B1 (describing that Occupy Wall Street, in its highlighting the extreme wealth disparity between the rich and the rest of America, “will help give concrete form to a political narrative that so far has remained abstract in the public mind: That the financial industry has so far gotten a pass on its responsibility for the 2008 crash and escaped sufficiently stringent regulation, while government assistance to banks and Wall Street firms has left consumers in the dust”); Robert Monks, *Occupy Wall St. Protest: A Harbinger of Sting?*,

heads of household are forced to answer for the sins of corporate executive duplicity.<sup>66</sup> When consequences are visited upon those least responsible for an economic crisis in order to prop up the powerfully entrenched and those most responsible for an economic crisis, then society stands at a serious, underappreciated crossroads.

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WASH. POST, Oct. 16, 2011, at G.2 (explaining Occupy Wall Street's motive as "rise[ing] out of a profound rage over unfairness in this country").

66. See Leland, *supra* note 44; Ali, Visconti & Frankel, *supra* note 62.

# An Essay on Slavery's Hidden Legacy: Social Hysteria and Structural Condonation of Incest

ZANITA E. FENTON\*

In 1830, the Governor of Virginia granted clemency to Peggy,<sup>1</sup> the slave and biological daughter of John Francis, for murdering her slave owner.<sup>2</sup> Peggy killed John Francis to end his abuse of her and his threats of rape.<sup>3</sup> Remarkably, the request for clemency was made by one-hundred (white) men of the county outraged by the repeated attempts of John Francis to have sexual relations with Peggy.<sup>4</sup>

Most revealing was that, even though at least two social/sexual taboos were in serious danger of transgression, no one made an effort to rebuke the conduct of John Francis or to protect Peggy prior to his death.<sup>5</sup> One may wonder whether these men perceived the greater offense as against the established taboos or against what those taboos protected: the white patriarchal order (and those symbolizing it). Indeed, the sequence of events demonstrates the strength of those social/sexual taboos, yet reveals an unstated imperative to protect the *actual* heir to power. Both the taboos and the apparent refusal to enforce them against those “intended” to hold power were central to maintaining the social structure.<sup>6</sup>

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\* Professor of Law, University of Miami School of Law. I thank Reginald Leamon Robinson for including my work in this important symposium and for always encouraging me to write.

1. See JOSHUA D. ROTHMAN, *NOTORIOUS IN THE NEIGHBORHOOD: SEX AND FAMILIES ACROSS THE COLOR LINE IN VIRGINIA, 1787-1861*, at 156-59 (2003).

2. *Id.* This recounts one story of the attempts at relations by John Francis, a white slave owner, with Peggy, his black slave and ostensibly his daughter. Peggy killed Francis to end his abuse and threats of rape in the face of her refusals.

3. *Id.*

4. *Id.*

5. *Id.* at 156.

6. See *id.* at 156-57.

The history of slavery and its effects within the United States, especially the impact on the black family and individuals who are African American, have been studied and postulated since before slavery formally ended.<sup>7</sup> What is less often discussed is the impact of slavery on white families<sup>8</sup> and the individuals who comprise those families, or generally the American family within society at large. For both the commission of incest or miscegenation, the event(s) were publicly condemned while simultaneously ignored and hidden, and thereby condoned. Despite the imperative for racial purity,<sup>9</sup> white men enjoyed a presumption of free access to slaves, as well as to freed women.<sup>10</sup> Indeed, because acts of miscegenation were so common, as was their denial, they occurred in *transparent obscurity*. Further, this white, patriarchal, sexual prerogative was unfettered and all but unchallenged,<sup>11</sup> even when such access resulted in an actual biological, incestuous coupling.<sup>12</sup> Thus, the convergence of the taboos, miscegenated incest/incestuous miscegeny, prompted the *hidden exhibition of incest*, first for relations between family members of “opposite” races, but also for any correlate relations within a “same” race family. Indeed, acknowledgment or exposure of incest between relatives of

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7. See GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 1075 (2d ed. 1962). See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 (1988) (providing a comprehensive historical examination of the Reconstruction era life and politics); LEON F. LITWACK, BEEN IN THE STORM SO LONG: THE AFTERMATH OF SLAVERY (1981) (evaluating the ambiguities and tensions in the interactions between black ex-slaves and white former slaveholders during the Civil War and after emancipation); GEORGE WASHINGTON WILLIAMS, HISTORY OF THE NEGRO RACE IN AMERICA, 1619-1880, vol. 1 (1882) (acting as the first comprehensive, scholarly treatment of African American history); CARTER G. WOODSON & CHARLES H. WESLEY, THE NEGRO IN OUR HISTORY (10th ed. 1922) (acting as an essential text in African American history).

8. My intention here is to explore one of the continuing social consequences. In a more philosophical sense, it is also the case that injury also hurts the perpetrator. Discussion of this point in the context of torture is instructive. See, e.g., Chanterelle Sung, *Torturing the Ticking Bomb Terrorist: An Analysis of Judicially Sanctioned Torture in the Context of Terrorism*, 23 B.C. THIRD WORLD L.J. 193, 212 (2003) (“To resort to judicially sanctioned torture as a means of preserving national security would be to abandon the most basic principles of democracy and capitulate to the goals of terrorism. Surely, this must not be allowed.”). See generally JEREMY WALDRON, TORTURE, TERROR, AND TRADE-OFFS: PHILOSOPHY FOR THE WHITE HOUSE (2010) (admonishing members of society to be attentive of the moral costs of acquiescing in the torture of human beings).

9. Indeed, the imperative extended almost exclusively to the maintenance of white racial purity and white supremacy. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 4, 6-7, 11 (1967) (discussing the structure of the Virginia miscegenation statute, other statutes identical to it, and how the statute's intention could only be understood as in support of white supremacy).

10. See, e.g., RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 162-82 (2003); Jennifer B. Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 117-23 (1983); ROTHMAN, *supra* note 1, at 133-63.

11. See *infra* notes 42, 84-85 and accompanying text.

12. See, e.g., *supra* notes 1-4 and accompanying text.

so-called opposite race challenged both the social construction of race and therefore the basis for social stratifications. In the least, it calls into question any alleged biological distinction and rationales for this stratification. Unfortunately, it may also be that the social construct of difference may have made these kinds of relations psychologically palatable because the relation could not be considered familial.

Nonetheless, once there was silent condonation for the liaisons between a white father and his reflection in brown, it must have become more psychologically plausible that such liaisons could also occur, with impunity, with his reflection in white. The commonsense progression within this power dynamic includes the unchallenged access of these same fathers to their white children.<sup>13</sup>

Incest taboos have the purpose of permitting the development of children in safe environments, free of sexual exploitation.<sup>14</sup> These taboos also make the interdependence of families within society necessary.<sup>15</sup> The strength of the incest taboo may, alone, be enough to prompt the intensity of the silence surrounding the subject, even in the face of strong indicators of its prevalence and the associated problems with its occurrence.<sup>16</sup> However, in the United States, the silence surrounding incest ought to be understood in tandem with the silence pertaining to interracial relations from the era of anti-miscegenation.

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13. In addition, the pursuit of power, in the guise of the normative, means black families, and all other American families, imitate the structure and realities of white families in power. This includes the structure and issue attendant to Patriarchal family. "Access to their children" was not limited to female children. Unfortunately, the historical record of first-hand accounts of same-gendered sexual abuse, incestuous or otherwise, is even more limited than those records indicating heterosexual forms of incest. Historian Trevor Burnard notes one first hand account in *Mastery, Tyranny, and Desire*. See TREVOR BURNARD, *MASTERY, TYRANNY, AND DESIRE: THOMAS THISTLEWOOD AND HIS SLAVES IN THE ANGLO-JAMAICAN WORLD* 216 (2004) ("Thistlewood notes two instances of this ('Report of Mr. Watt Committing Sodomy with his Negroe waiting Boy' and 'strange reports about the parson and John his man')"); see also Mary Frances Berry, *The Crime that Had No Name: Narratives of Gay and Lesbian Sex*, in *THE PIG FARMER'S DAUGHTER AND OTHER TALES OF AMERICAN JUSTICE: EPISODES OF RACISM AND SEXISM IN THE COURTS FROM 1865 TO THE PRESENT* 49-78 (1999).

14. See Margaret Mead, *Anomalies in American Post-Divorce Relationships*, in *DIVORCE AND AFTER* 104-08 (Paul Bohannon ed., 1970).

15. See Claude Levi-Strauss, *The Family*, in *MAN, CULTURE AND SOCIETY* 261, 276-78 (Harry L. Shapiro ed., 1956).

16. See generally DIANA E. H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* (1986) (providing evidence and argument identifying the overwhelming prevalence of incestuous abuse, nationally).

The core issues underlying a discussion of the connection between incest and miscegenation are misogyny and racism.<sup>17</sup> In *Man's Most Dangerous Myth: The Fallacy of Race*, Ashley Montagu discusses the parallel between antifeminism and race prejudice:

In connection with the modern form of race prejudice it is of interest to recall that almost every one of the arguments used by the racists to 'prove' the inferiority of one or another so-called 'race' was not so long ago used by the antifeminists to 'prove' the inferiority of the female as compared with the male.<sup>18</sup>

Other prominent authors, such as Simone Beauvoir in *The Second Sex*<sup>19</sup> and Gunnar Myrdal in *An American Dilemma*,<sup>20</sup> have noted the similarities between the problems of race and gender. Myrdal observed that the myths perpetuating the inferior status of race and gender were almost identical;<sup>21</sup> the similarity was not accidental, but originated in the paternalistic order of society.<sup>22</sup> Correspondingly, the parallels between the taboos of incest and of miscegenation were at one time so close, that during the antebellum period they were, on occasion, understood as identical.<sup>23</sup>

This Essay is a "thought" piece, relying on historical texts concerning society, politics, and the development of psychoanalytic conventions. The analysis offered in this Essay relies often on the absence of text and direct evidence as a means to elucidate the apparent, yet veiled problem of modern-day incest. Part I discusses the political considerations and legal thought regarding the connections between incest and miscegenation, primarily from the Ante-bellum

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17. Both identify and describe the nature of power as situated by sex, with race implicit in the first and explicit in the second.

18. ASHLEY MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 181 (4th ed. 1964).

19. SIMONE DE BEAUVOIR, *THE SECOND SEX* 116, 297, 331, 714-15 (Parshley ed. & trans., 5th ed. 1964); see also Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 234 (1965).

20. MYRDAL, *supra* note 7, at 1075; see also Murray & Eastwood, *supra* note 19, at 234.

21. MYRDAL, *supra* note 7, at 1077.

22. *Id.* at 1075 ("[T]he fight in America for the liberation of the Negro slaves was, therefore, closely coordinated with the fight for women's emancipation . . . The women's movement got much of its public support by reason of its affiliation with the Abolitionist movement."); see also Murray & Eastwood, *supra* note 19, at 234 (noting Myrdal's finding that the similarity of the two problems originated in the paternalistic order of society).

23. See *infra* Part III; see also *Ratcliff v. State*, 234 Miss. 724, 730 (1958) ("[D]ifferences in race cannot be deemed incestuous."). This case was a landscape altering case that analyzed the differences and relationship between incest and miscegenation, choosing not to construe as misdrafted "and" to expand the definition of incest. Courtney Megan Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 Nw. U. L. REV. 1543, 1591 (2005).

South, which sustained the social order of the time. Part II discusses the prevailing family and its role in maintaining both patriarch and the racial social order. Part III identifies the parallels between the mythologies associated with incest and with miscegenation. It further discusses psychology as it affects an individual victim and situation. Part III closes by addressing the possibility of community-based psychology and mass hysterics contributing to the denial of existing social transgressions. The Essay concludes by suggesting how the various constructs identified have modern relevance.

### I. POLITICAL AND LEGAL AFFAIRS. . .

Incest is a by-product of plantation community ordering and a consequence of these de facto polygamous families.<sup>24</sup> Nonetheless, the power structure, enabling the continued existence of the institution of slavery, distorted the traditional incentive structure of incest taboos.<sup>25</sup> If one objective of the incest taboo was to ensure nurturance from “care-giving” adults for their biological children,<sup>26</sup> this social imperative was undermined by other social schema intended to formulate caste by dehumanizing those subjected to slavery, including their own offspring. This being the case, the secondary objective of the incest taboo, promotion of family interdependence,<sup>27</sup> becomes all but immaterial in the interactions of the power holders (white males) with members of the subordinated community (enslaved blacks). Miscegenation, while ostensibly prohibiting interracial sexual liaisons, simultaneously an important foundation fostering social stratification. In effect, white slave masters could enjoy unrestricted sexual access to their black children that breached the underlying objective of both the incest and miscegenation taboos: he could have relations with his biological child because she was not white; he was not be expected to interconnect (read: marriage / read: sex) with non-related individuals from the subordinated black slave community.<sup>28</sup> These improper rela-

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24. See, e.g., *State v. Green*, 99 P.3d 820, 830 (Utah 2004) (“Most importantly, Utah’s bigamy statute serves the State’s interest in protecting vulnerable individuals from exploitation and abuse. The practice of polygamy, in particular, often coincides with crimes targeting women and children. Crimes not unusually attendant to the practice of polygamy include incest, sexual assault, statutory rape, and failure to pay child support.”). See generally Ryan D. Tenney, Tom Green, *Common-Law Marriage, and the Illegality of Putative Polygamy*, 17 *BYU J. PUB. L.* 141 (2002) (discussing the legal issues arising along with unsanctioned polygamous unions).

25. See Mead, *supra* note 14, at 104-08; see also Levi-Strauss, *supra* note 15, at 276-78.

26. See Mead, *supra* note 14, at 104-08.

27. See Levi-Strauss, *supra* note 15, at 276-78.

28. *Id.*

tions, deemed incestuous independent of slavery and otherwise the subject of public condemnation, were tacitly accepted in a society that promoted the ownership of human beings:<sup>29</sup> “Human beings, often blood relatives, were—in the name of race—treated as objects, articles, or things; living beings were ‘naturally alienated,’ considered ‘socially dead.’”<sup>30</sup> That is to say, racial politics created the hidden exhibition of incest.

In the antebellum South, incest and miscegenation were inseparable and socially and politically synonymous.<sup>31</sup> The central focus on the “Patriarchal Family”<sup>32</sup> was the root of *both* patriarchy and white supremacy, making these two social power hierarchies so closely related *as to be incestuous*. “Religious and secular proslavery theorists alike forcefully insisted that all social relations—notably those of slavery—depended upon and were grounded in the natural and divinely sanctioned subordination of women to men.”<sup>33</sup> Essentially, sex and politics were often conflated, most especially in a society ascribing to miscegenation.<sup>34</sup>

The conflation of sex and politics, the terrorization of black men, the abuse of white women, and the violent condemnation of any behavior deemed morally transgressive—these were interlocking elements in the broader sexualization of politics in the Reconstruction South. Every form of power exercised by freedmen meant a parallel loss of power for white men. That included newfound authority over black women in the domestic sphere, as well as any invented or observed agency or aggression in relation to white women, whether

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29. See ORLANDO PATTERSON, *SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY* 35-36 (1982).

30. Werner Sollors, “*Never Was Born*”: *The Mulatto, An American Tragedy?*, 27 *MASS. REV. INC.* 293, 297 (1986) (citing Orlando Patterson, *Slavery and Social Death: A Comparative Study* 35-76 (1982)); see also FREDERICK DOUGLASS, *NARRATIVE OF THE LIFE OF FREDERICK DOUGLASS, AN AMERICAN SLAVE* (2011) (highlighting the common practice of white slave owners raping slave women, both to satisfy their sexual hungers and to expand their slave populations).

31. See Sidney Kaplan, *The Miscegenation Issue in the Election of 1864*, 34 *J. NEGRO HIST.* 274, 309-20 (1949).

32. See Elizabeth Fox-Genovese, *Family and Female Identity in the Antebellum South: Sarah Gayle and Her Family*, in *IN JOY AND IN SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH, 1830-1900*, at 15, 19 (Carol Bleser ed., 1991) (“Family figured as a central metaphor for southern society as a whole—for the personal and social relations through which individuals defined their identities and understood their lives.”).

33. *Id.*

34. See, e.g., LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* 146-48 (1955).



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in the form of marriage, cohabitation, fornication, adultery, familiarity, brazenness, harassment, sexual assault, or rape.<sup>35</sup>

In the 1852 *Treatise on Sociology: Theoretical and Practical*, white supremacist Henry Hughes, asserted political rationales for why interracial and intra-familial sexual relations were *both* incestuous:

The black race must be civilly either (1), Subsovereign, (2) Sovereign, or (3), Supersovereign. If not subsovereign, they must be co-sovereign. The white race may also be subsovereign, sovereign, or supersovereign. If both races are *promiscuously* sovereign; that is co-sovereignty. The white race is now and has been sovereign; the black, subsovereign. Thus, the historical fact is. . . . [that] the black race ought not to be admitted to co-sovereignty. It is wrong; it is in violation of moral duty. . . . These races must be either equal or unequal. They must be either superior or inferior. If superior, their ethnical progress forbids intermixture with an inferior race. But races must progress. Men have not political or economic duties only. Morality . . . which commands general progress, . . . prohibits this special regress. The preservation and progress of a race, is a moral duty of the races. Degeneration is evil. It is a sin. That sin is extreme. Hybridism is heinous. Impurity of races is against the law of nature. Mulattoes are monsters. The law of nature is the law of God. *The same law which forbids consanguineous amalgamation forbids ethnical amalgamation. Both are incestuous. Amalgamation is incest.*<sup>36</sup>

Of this passage and viewpoint, Americanist Werner Sollors states that “the hysteria that enveloped the discourse of slavery immediately before the Civil War” prescribed the “illogical and eventually ironic position” of making incest the inescapable alternative to interracial marriage.<sup>37</sup> One scholar notes that “the more restrictive the intrafamilial prohibition, the more likely that one would go outside her

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35. MARTHA HODES, *WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE NINETEENTH CENTURY SOUTH* 171-72 (1997).

36. Henry Hughes, *Treatise on Sociology: Theoretical and Practical* (1854), reprinted in *The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830-1860*, at 259-60 (Drew Gilpin Faust ed., 1981) (emphasis added); see also Cahill, *supra* note 23, at 1588 (“Prior to  *Loving v. Virginia*, incest was not only a feared result of the decriminalization of miscegenation, but was, in fact, used synonymously with that term.”) (emphasis added).

37. WERNER SOLLORS, *NEITHER BLACK NOR WHITE YET BOTH: THEMATIC EXPLORATIONS OF INTERRACIAL LITERATURE* 298 (1997) (quoting David Lawrence Rodgers, *The Irony of Idealism: William Faulkner and the South's Construction of the Mulatto*, in *THE DISCOURSE OF SLAVERY: APHRA BEHN TO TONI MORRISON* 166 (Carl Plasa & Betty J. Ring eds., 1994)); see also Cahill, *supra* note 23, at 1591 (“In fact, it would appear that the incest prohibition, which functions in a positive way to ensure or compel marriage outside the family, would itself create the conditions that make miscegenation possible.”).

family to find a marital partner, sexual partner, or both. At the same time, the potent taboo against miscegenation—particularly in the rural South—made the threat of incest that much more real.”<sup>38</sup> This dynamic increased the threat of interracial rapes as well as incestuous abuses, sometimes being one and the same. Werner Sollors notes that “the possibility of sibling incest in a younger generation [often resulted] from the secrecy of miscegenation of [the prior generation of] elders.”<sup>39</sup>

One newspaper, the *World*, criticized the editorial publications of the *Tribune* for advocating miscegenation and negrophilism, likening these “abominations” to incest.

The *World* did ‘not propose to enter the lists with the *Tribune*, or any other advocate’ of miscegenation. . . . If marriage is recommended for a white man with a black woman begetting his children—then precisely the same solution ‘might be asked in relation to incest, or any other abomination which the *progressists* have not yet dubbed with a euphemistic name.’ Opinions of this sort were ‘the logical outgrowth of the extravagant negrophilism’ which had ‘its carnival of blood in this cruel civil war.’ ‘We cannot discuss these abominations,’ piously concluded the *World*.<sup>40</sup>

In addition, the general laws supported sexual misconduct with impunity. For example, in an attempt to give the law the appearance of consistency and fairness, Thomas Reed Rootes notes that, “[a]nother consequence of slavery is, that the violation of the person of a female slave, carries with it no other punishment than the damages which the master may recover for the trespass upon his property.”<sup>41</sup> Comparing this to the laws from prior slave societies, he suggests that, “[i]t is a matter worthy the consideration of legislators, whether the offence of rape, committed upon a female slave, should not be indictable; and whether, when committed by the master, there should not be superadded the sale of the slave to some other

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38. Cahill, *supra* note 23, at 1591.

39. SOLLORS, *supra* note 37, at 303; *see also* Cahill, *supra* note 23, at 1591 n.198 (“The secrecy surrounding miscegenation and the frequent denial of one’s paternity (or maternity) to a ‘mulatto’ child led to situations that supposedly raised the specter of incest and, particularly, sibling incest.”); *id.* at 1591 n.196 (“Sollors describes how the ‘fantasy of purity’ at the heart of antimiscegenation laws and rhetoric involved ‘both the need for the violent purging of impurity and the regression to the incestuously toned realm of origins alone.’”).

40. Kaplan, *supra* note 31, at 309 (“We merely record and call attention to the *fact* that the leading Republican journal of the country is the unblushing advocate of ‘miscegenation,’ which it ranks with the highest questions of social and political philosophy.”).

41. THOMAS R. R. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA: TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY 99 (1999).

master.”<sup>42</sup> He goes on to justify differential treatment and enforcement of his proposed reform when he indicates “[t]he occurrence of such an offence is almost unheard of; and the known lasciviousness of the negro, renders the possibility of its occurrence very remote; yet, for *the honor of the statute-book*, if it does occur, there should be an adequate punishment.”<sup>43</sup>

From case law, rhetoric and results, it is evident that the effects of incestuous assault on victims were not the primary concern of the state in antebellum decisions. Sexual abuse apparently was only problematic for Southern judges because it undermined the ideology of the family as a means of social control. The existent intrafamily sexual abuse uncovered the coercive nature of patriarchal authority.<sup>44</sup> Indeed:

by isolating those men who undeniably abused their power to gain sexual satisfaction from females in their family and treating them as deviants rather than locating the source of incestuous behavior in the hierarchical nature of the household itself, southern jurists helped to preserve the patriarchal ideal and minimize state intrusion in the private sphere.<sup>45</sup>

For example, the Texas Supreme Court, in *Tuberville v. State*, declared in 1849 that incest is “so shocking to the moral sense of every civilized being, so degrading and humiliating to human nature, reducing man from his boastful superiority of a moral, rational being to a level with the brutal creation.”<sup>46</sup> One might wonder if the reference to the “brutal creation” is not intended to mean the stereotyped black male and foil to the assumptive stature of white male power-holders.<sup>47</sup> This court goes on to reverse a jury verdict convicting a (white) father of incest with his daughter as contrary to the evidence.<sup>48</sup> He insisted that only in the face of the “most indisputable proof” would the court ac-

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42. *Id.* at 99-100.

43. *Id.* at 100 (emphasis added).

44. Peter Bardaglio, “An Outrage Upon Nature”: *Incest and the Law in the Nineteenth-Century South*, in *IN JOY AND IN SORROW: WOMEN, FAMILY, AND MARRIAGE IN THE VICTORIAN SOUTH, 1830-1900*, at 43 (Carol Bleser ed., 1991).

45. *Id.* at 34.

46. *Tuberville v. State*, 4 Tex. 128, 130 (1849).

47. See EMILY WEST, *CHAINS OF LOVE: SLAVE COUPLES IN ANTEBELLUM SOUTH CAROLINA* 117 (2004) (“[S]tereotyping served to rationalize interracial sexual liaisons in the minds of slaveholders, while removing the blame for sexual contact from white members of society (with the exception of poor white women). Stereotypical attitudes provide an important perspective from which to examine issues of sexual relationships and sexual abuse.”).

48. See *Tuberville*, 4 Tex. at 133, 137.

cept even the possibility that such a crime had been committed.<sup>49</sup> This Judge went to great lengths to find alternative explanations for that relied upon by the jury. The court found that there was not “the slightest legal proof that our *country* ha[d] been degraded by the commission of so loathsome, so heartsickening an offense in our midst” and awarded a new trial to a man indicted for committing incest with his daughter.<sup>50</sup> The court went on to say “it would only be when by open and habitual indulgence that it would become public scandal and be punishable as open lewdness.”<sup>51</sup> In a supreme form of denial, the state obscures the existence of incest as an offence and ignores the harms done to the child,<sup>52</sup> using rhetoric that makes allusion to the honor of the country being analogous to that of a father.

One discredited rationale for incest prohibitions is the belief that such unions will produce children with birth defects.<sup>53</sup> In fact, this likelihood is only slightly higher than for the general population (which is roughly 3-4%)<sup>54</sup> and is predestined by the taboos themselves.<sup>55</sup> The “corruption of blood” and the pseudo-science regarding the ill-effects on the quality of citizenship is just one of many parallel myths in the uses of incest and miscegenation taboos for the purpose of social control.

State and other important actors made efforts to protect the prevailing social order by using “science” as a justification of these taboos.<sup>56</sup> In a 1966 article bemoaning the use of such “science,” Walter Waddlington critiques *Loving v. Virginia*, pointing out, “it is more likely that the state would contend that the purpose of the [miscegena-

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49. See Bardaglio, *supra* note 44, at 43 (discussing *Tuberville*, 4 Tex. at 130).

50. *Tuberville*, 4 Tex. at 130.

51. *Id.* at 137.

52. See Bardaglio, *supra* note 44, at 43 (discussing *Tuberville*, 4 Tex. at 130).

53. See Denise Grady, *Few Risks Seen to the Children of 1st Cousins*, N.Y. TIMES, Apr. 4, 2002, at A1 (“Contrary to widely held beliefs and longstanding taboos in America, first cousins can have children together without a great risk of birth defects or genetic disease, scientists are reporting today. They say there is no biological reason to discourage cousins from marrying.”).

54. See *id.* (“In the general population, the risk that a child will be born with a serious problem like spina bifida or cystic fibrosis is 3 percent to 4 percent; to that background risk, first cousins must add another 1.7 to 2.8 percentage points, the report said.”) (discussing Robin L. Bennett et al., *Genetic Counseling and Screening of Consanguineous Couples and Their Offspring: Recommendations of the National Society of Genetic Counselors*, 11 J. GENETIC COUNSELING 97 (2002)).

55. See Mead, *supra* 14, at 104-08.

56. In addition to contending that the purpose of her miscegenation law is to assure the quality of her citizenry, Virginia might also argue that the law is intended to protect against racial tension. However, it is unlikely that the Court would agree since in simplest terms the thrust of this argument is that people’s prejudices must be preserved for the sake of social order. See *The Supreme Court, 1964 Term*, 79 HARV. L. REV. 103, 167 (1965).

tion] statute is to protect against a 'corruption of blood' which would 'weaken or destroy the quality of its citizenship.'"<sup>57</sup> Waddlington draws attention to a Louisiana statute prescribing blood transfusions from blood not labeled with the donor's race,<sup>58</sup> stating that "recent studies have seriously discredited the theory that a person of mixed blood is 'inferior' in quality to one of absolute racial purity."<sup>59</sup> The use of bogus science served the social goals of promoting the taboos against incest as well as against miscegenation; ironically, either could have been used for the protection of children; neither did so adequately.

## II. HISTORICAL SOCIAL ORDER

As several historians have noted, the dynamics of family life in Victorian society had a distinctly incestuous character. The new emphasis placed on the cultivation of affection and sentiment among family members combined with great concern about the need to control sexuality produced profound strains in the household. It should not be surprising, then, that the explosive nature of incest made its regulation a highly sensitive matter among Victorians, particularly in the South where the household was the foundation of the social order.<sup>60</sup>

There are accounts that suggest miscegenated incest was commonplace. In one news editorial, a soldier spoke with several ex-slaves, who were the children of a single planter, and wrote that one woman confessed to being that white planter's child. Her mentally challenged child stood nearby when he asked:

[I]f Mr. Scott, [the planter,] was [this child's] father . . . [t]he incestuous old beast! This idiot son—the child of his own daughter and grandfather to his own children! . . . Do you know how these skin aristocrats rave over the new theory of miscegenation . . . [here] was the very worst form of incestuous amalgamation.<sup>61</sup>

In another account, historian, Joshua Rothman, reports that:

Ex-slave William Thompson, born eighteen miles from Richmond, claimed that he knew a slave owner who had six children by one of his slaves. 'Then there was a fuss between him and his wife,

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57. Walter Waddlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189, 1217 (1966) (discussing *Naim v. Naim*, 197 Va. 80, 90 (1955)).

58. *Id.* at 1204 n.97 (citing LA. REV. STAT. ANN § 40:1296.1 (1965)).

59. *Id.* at 1218 (citing OTTO KLINEBERG, *CHARACTERISTICS OF THE AMERICAN NEGRO* (1944); UNESCO, *THE RACE QUESTION IN MODERN SCIENCE: THE RACE CONCEPT* 10 (1952)).

60. See Bardaglio, *supra* note 44, at 33.

61. Kaplan, *supra* note 31, at 320 n.65.

and he sold all the children but the oldest slave daughter. Afterward, he had a child by this daughter, and sold mother and child before the birth . . . . Such things are done frequently in the South.<sup>62</sup>

Rothman nonetheless opines that incest across the color line was unusual; befittingly, this assertion is hidden in a footnote.<sup>63</sup> From his perspective, we are led to believe that interracial, intra-family, same-gender liaisons were quite limited; we might also believe that and homosexual abuse was non-existent. Because of the lack of first-hand sources, both assertions are plausible.<sup>64</sup> However, an alternative interpretation of this lack of first-hand sources, acknowledges the strength of the taboos, lessening the likelihood of revealing first-hand accounts. In addition, the most likely victims of such transgressions crossing the color-line were not permitted to write, unable to find someone who would do so on their behalf, or otherwise uneducated and unable to do so for themselves.<sup>65</sup> Rothman also mentions period literature that discusses incestuous encounters. He dismisses these as fantasy and literary device, not as based in any semblance of truth.<sup>66</sup> However, period literature is routinely understood as a representation of reality and a manner of divulging truth,<sup>67</sup> while obscuring the identity of real people.

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62. ROTHMAN, *supra* note 1, at 285-86 n.63.

63. *Id.*

64. The lack of sources concerning the even greater taboo of same-gender liaisons, consensual and otherwise, support this view that the strength of the taboo contributed to the non-acknowledgement and the lack of sources. See BURNARD, *supra* note 13, at 216; BERRY, *supra* note 13, at 49-78.

65. See, e.g., EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* 561-67 (1974).

66. ROTHMAN, *supra* note 1, at 285 n.63. ("A number of contemporary authors have pointed out the recurring appearance together of incest and miscegenation themes in nineteenth-and-twentieth-century fiction, probably most famously in William Faulkner's *Absalom! Absalom!* (citation omitted). For an exploration of the conjunction of incest and miscegenation themes in literature, see Sollors, [*supra* note 37, at 298 (quoting David Lawrence Rodgers, *The Irony Of Idealism: William Faulkner And The South's Construction Of The Mulatto*, in *THE DISCOURSE OF SLAVERY: APHRA BEHN TO TONI MORRISON* ch. 10 (Carl Plasa & Betty J. Ring eds., 1994))]."). On southern attitudes towards incest in the nineteenth century, see Bardaglio, *supra* note 43, at 32-51.

67. Sir Philip Sidney suggests that literature creates a "golden world," a better, truer, and nobler reality, whereas discourses that convey facts deal in baser truths. See generally SIR PHILIP SIDNEY, *AN APOLOGY FOR POETRY* (Mary R. Mahl ed., 1969) (asserting that literature and fiction have the capacity to teach and demonstrate virtue most effectively). In this context, one would imagine that fiction may never represent the harshness of reality, yet does represent a piece of that reality.

The rape of slave women by white men marked the distinct convergence of racial, sexual, and economic systems.<sup>68</sup> Coercion and rape of slave children, adolescents, and adults, who were probably the child (or half-sibling) of the slave master, was unfortunate further convergence of these structures. The additional power differential generally present between parent and child, the social pressure to hide the breach of taboo, and the psychological trauma often suppressed by the victim, make these encounters especially pernicious.

Historians and legal scholars acknowledge the existence of numerous interracial sexual unions. Liaisons between black men and white women, frequently consensual, “were bound up with politics in dialogues about Klan violence.”<sup>69</sup> Black women also had consensual unions with white men, but were not usually the target of public violence.<sup>70</sup> However, black women were routinely subjected to rapes, though rarely acknowledged as such.<sup>71</sup> The presumptive authority of white slave-masters predetermined the legal framework whereby rape of an enslaved, or even emancipated, black woman was not legally cognizable.<sup>72</sup> The lack of choice on the part of black slave women in their sexual encounters sustained the presumption of their immorality.<sup>73</sup> Not only were the rapists of black females not prosecuted, black women were lynched on occasion.<sup>74</sup> This harsh and stark reality ought

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68. VICTORIA E. BYNUM, *UNRULY WOMEN: THE POLITICS OF SOCIAL AND SEXUAL CONTROL IN THE OLD SOUTH* 5 (1992).

69. HODES, *supra* note 35, at 171.

70. See Patricia Hill Collins, *Introduction to IDA B. WELLS-BARNETT, ON LYNCHINGS* 11–12 (2002)

71. See KENNEDY, *supra* note 10, at 217; BYNUM, *supra* note 68, at 109, 187 n.75 (“During the 1850s the courts of Granville, Orange, and Montgomery counties recorded only one indictment for a rape of a black woman and three indictments for rapes committed or attempted on white women. In April 1856, Sarah Ware Nuttall charged a ‘slave boy’ belonging to Mary Wagstaff with having raped her slave Rosa, described in the indictment as ‘under the age of 10 years.’”). See generally RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* (2001) (providing a comprehensive study of the history of interracial relationships and the legal regulation of such relationships). Also consider centuries of rape and sexual abuse without formal legal redress. See JUDITH LEWIS HERMAN & LISA HIRSCHMAN, *FATHER-DAUGHTER INCEST* 11 (1981); 3A JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW §924a* (James H. Chadborn ed., Little, Brown and Company 1970) (1904).

72. BYNUM, *supra* note 68. Rapes of black women not documented in slavery, and in employers’ kitchens once slavery ended did not precipitate lynching or formal action by the justice system. See Collins, *supra* note 70, at 11–12 (2002); Wriggins, *supra* note 10, at 117–20.

73. See Wriggins, *supra* note 10 at 120–21 (“These attitudes reflect a set of myths about [b]lack women’s supposed promiscuity which were used to excuse white men’s sexual abuse of [b]lack women.”).

74. There are recorded instances of the lynching of black women. See Kendall Thomas, *Strange Fruit*, in *RACE-ING JUSTICE, EN-GENDERING POWER* 364, 370 (Toni Morrison ed., 1992) (“In addition to suffering rape and other forms of sexual terror, a number of black females lost their lives at the hands of lynch parties.”); Collins, *supra* note 70, at 13–14, 24.

to be considered in the light of the non-prosecution of the rapists of white women; these offenses may have been legally cognizable, but were rarely acknowledged or prosecuted.<sup>75</sup> Rape for white women was originally offense trespass against the property interest of the father or husband as owner of the woman violated.<sup>76</sup> Furthermore, where there were formal laws regarding incestuous marriages written during the antebellum period, informal sexual behavior was only differentially enforced or punished.<sup>77</sup>

Correspondingly, while the volume of interracial relations, consensual and otherwise, miscegenation was the order of the day—gaining taboo status and prescribed by the state through a variety of statutory prohibitions.<sup>78</sup>

In those indictments of fornication aimed at punishing miscegenation, magistrates prosecuted primarily white women and black men rather than white men and black women. This uneven application of the law reflected the structure of gender and racial relationships. White males claimed the right to govern all women, regardless of race.<sup>79</sup>

In essence, the effect of miscegenation laws and social structures was to control sexual access to white women and limit the power/sexual freedom of black men. The implicit purpose of the laws was to maintain the white patriarchal family structure and the social supremacy of white men.

### III. HYSTERIA

In the treatment of both incest and miscegenation, there has been routine deference to the presumed benevolence of the power-holder, whether it is the father/“protector”<sup>80</sup> or “protective” slave master. So-

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75. BYNUM, *supra* note 68, at 118-19.

76. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 17 (1975); Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 *LAW & SOC. INQUIRY* 941, 949 (1995) (“The wife who inherits no property holds about the same legal position as does the slave of the Southern plantation. She can own nothing, sell nothing. She has no right even to the wages she earns; her person, her time, her services are the property of another.”) (quoting Elizabeth Cady Stanton, *Address to the Legislature of New York on Women’s Rights, February 14, 1854*, in ELIZABETH CADY STANTON, SUSAN B. ANTHONY: CORRESPONDENCE, WRITINGS, SPEECHES 48 (Ellen Carol Dubois ed., 1992)); see also CAROLE PATEMAN, *THE SEXUAL CONTRACT* 2 (1988); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 *HARV. L. REV.* 135, 142 (2000).

77. BYNUM, *supra* note 68, at 96.

78. See KENNEDY, *supra* note 10, at 214-23.

79. *Id.* (footnotes omitted).

80. “This disturbing fact, embarrassing to men in general and to fathers in particular, has been repeatedly unearthed in the past hundred years, and just as repeatedly buried. Any serious



ciety also uses stereotype to diminish the victim in both cases. At various times, society characterizes black women as the seductresses, sexually indiscriminate and prone to lying. Society has also believed that the victims of incest are the seductresses and deemed to lie.<sup>81</sup> Interestingly, and the sociological and political controversies regarding the significance of incestuous miscegenation<sup>82</sup> and the controversies that surround incest within the field of psychology appear to be parallel in that for both, members of society deny, or strongly question, the authenticity of such phenomena.

In roughly the same time-frame as the Antebellum South, Sigmund Freud conducted research regarding the causes of “hysteria”<sup>83</sup> in women and initially concluded that hysteria was caused by incestuous encounters and abuse by adult male figures, usually by fathers and occurring during the young and formative years of a woman’s life. “In 1896, with the publication of two works, *The Aetiology of Hysteria* and *Studies on Hysteria*, [Freud] announced that he had solved the mystery of the female neurosis. At the origin of every case of hysteria, Freud asserted, was a childhood sexual trauma.”<sup>84</sup> He later altered his conclusions and decided that the allegations of incest he studied were in fact fabricated.<sup>85</sup> Privately, Freud acknowledged the opposite.<sup>86</sup> Some scholars suggest that Freud was uncomfortable with his original findings “because of what it implied about the behavior of respectable family men. If his patients’ reports were true, incest

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investigation of the emotional and sexual lives of women leads eventually to the discovery of the incest secret.” HERMAN & HIRSCHMAN, *supra* note 71, at 7.

81. See Patricia Hill Collins, *Learning From the Outsider Within: The Sociological Significance of Black Feminist Thought*, 33 SOC. PROBS. S14, S17 (1986); see also discussion *supra* notes 40-42 and accompanying texts; discussion, *supra* note 71.

82. See generally ELAINE WESTERLUND, *WOMEN’S SEXUALITY AFTER CHILDHOOD INCEST* (1992) (providing a research study on the sexual attitudes and practices of women with incest histories, including both statistical and anecdotal findings). For modern examples of this continuing phenomenon, see Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 927-29 (1994).

83. For a modern definition of “hysteria,” see David S. Caudill, *Social Hysteria and Social Psychoanalysis: A Response to Brion’s The Hidden Persistence of Witchcraft*, 5 L. & CRITIQUE 31, 32 (1994) (“[H]ysteria’ disappear[ed] from official diagnostic usage, . . . now means a symptom in the absence of any disease [partly from] a feminist critique of the traditional psychoanalytic category (‘conversion hysteria’) as sexist, as the result of male-dominated institutional practice.”)

84. HERMAN & HIRSCHMAN, *supra* note 71, at 9 (citing Sigmund Freud, *The Aetiology of Hysteria*, in 3 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 191-221 (James Strachey trans., 1962)). See generally JOSEF BREUER & SIGMUND FREUD, *STUDIES ON HYSTERIA* (1957) (providing an analysis of emotional psychosis of women based on client accounts).

85. HERMAN & HIRSCHMAN, *supra* note 71, at 9-10.

86. *Id.*

was not a rare abuse . . . but was endemic to the patriarchal family.”<sup>87</sup> His later rejection of his seduction theory enabled him to conclude that “his patients’ reports of sexual abuse were fantasies, based upon their own incestuous wishes . . . . To incriminate daughters rather than fathers was an immense relief to him, even though it entailed a public admission that he had been mistaken.”<sup>88</sup>

Analyses of Freud’s reinterpretation of his own work are, without a doubt, controversial.<sup>89</sup> These analyses are, nonetheless, consistent with the dynamic enshrouding incest from a sociological and political standpoint. They allude to a strong psychological need for individuals within society to deny that which is contrary to expectations, even for analysts.<sup>90</sup> And, “[t]he link between hysteria and repressive cultural

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87. *Id.* at 9; see also JEFFREY MOUSSAIEFF MASSON, *THE ASSAULT ON TRUTH: THE SUPPRESSION OF FREUD’S SEDUCTION THEORY* (1981) (uncovering the truth about Freud’s reversal and highlighting its enduring impact on the theory and practice of psychoanalysis).

88. HERMAN & HIRSCHMAN, *supra* note 71, at 10 (citing *THE ORIGINS OF PSYCHO-ANALYSIS: LETTERS OF WILHELM FIESS, DRAFTS AND NOTES, 1887-1902*, at 215-17 (Marie Bonaparte et al. eds., Erich Mosbacher & James Strachey trans., 1954)).

89. We are troubled not by modern researchers asking reasonable questions about Freud’s writing and possible discoveries but by the certainty with which they claim to know the answers to these questions. Although we agree that the position that Freud truly made irrefutable discoveries of abuse is questionable and that the way his discoveries were made has been misrepresented in some historical texts, the conclusion that such discoveries were made has been misrepresented in some historical texts, the conclusion that such discoveries definitively never happened is unwarranted. There is a fair amount of evidence that some, if not all, of the discoveries were genuine. Furthermore, those who assert that the discoveries did not occur have supported their positions by either misrepresenting what Freud actually wrote or, ignoring evidence that contradicted their hypothesis, or failing to consider rather obvious and more plausible explanations for some of Freud’s behavior. This last explanation refers to political pressure, those written about by Mason (1984), which do indeed seem to still be alive and well more than 100 years after the fact.

David H. Gleaves & Elsa Hernandez, *Recent Reformulations of Freud’s Development and Abandonment of his Seduction Theory: Historical/Scientific Clarification or a Continued Assault on Truth?*, in *HISTORY OF PSYCHOLOGY* 324, 351 (1999). Alternatively:

[B]oth adult and infantile sexuality are ubiquitous phenomena, and can act as a potential cause of mental disorder; but to qualify as an actual—both sufficient and efficient—cause, it has to be clinically demonstrated in a given case. The same goes for aggression or any other dynamic motivational factor . . . . Therefore, sexuality does play a decisive role in many cases, but not uniformly in all cases.

Freud never gave up the seduction theory . . . . It was never an either/or proposition between a memory of an actual event or a fabrication of one, but the subtle interplay of perception and fantasy, impression and impulse, fantasy and memory, which happens to us all and in all ages.

Zvi Lothane, *Psychoanalytic Method and the Mischief of Freud-Bashers*, *PSYCHIATRIC TIMES*, Dec. 1, 1996, at 3; see also Erna Olafson et al., *Modern History of Child Sexual Abuse Awareness: Cycles of Discovery and Suppression*, *CHILD ABUSE & NEGLECT*, Jan.-Feb. 1993, at 11 (“Although there is debate about his motives for doing so, surely it is now indisputable that Freud did indeed change his mind after 1896 and came to ascribe his patients’ accounts of ‘seduction’ to early childhood autoerotic fantasies.”).

90. Lara S. Brown, *Not Outside the Range: One Feminist Perspective on Psychic Trauma*, in *TRAUMA: EXPLORATIONS IN MEMORY* 100, 100-12 (Cathy Caruth ed., 1995).

structures highlights women as outsiders—deprived of power and voice, those to be feared and distrusted.”<sup>91</sup>

Freud identified three levels of hysteria, one of which was “mass hysteria,” affecting a group of persons.<sup>92</sup> In supposing such allegations to be false, mass hysteria is identifiable in community reactions to allegations of incest and sexual abuse.<sup>93</sup> “[C]ontemporary cases involving false accusations of child abuse can be viewed . . . as a matter of unacknowledged social and political disorder.”<sup>94</sup> Ironically, controversy regarding incest, amongst scholars in the field of psychiatry and psychology, revolves around an apparent collective need to deny or obscure even the potential that reality does not measure or comport with societal aspiration. Modern controversies concerning the work of Freud, which resurface at regular intervals,<sup>95</sup> may themselves be a form of mass hysteria.<sup>96</sup> Correspondingly mass hysteria is identifiable in racial contexts,<sup>97</sup> at emancipation, as well as during the civil rights reform efforts. For example, “[i]n the 1970s, judges observed ‘Southern White’ hysteria over civil rights progress.”<sup>98</sup> These parallels can-

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91. Caudill, *supra* note 83, at 43. There may also be a connection of this phenomenon to traditional psychoanalytic categories, such as “conversion hysteria,” which are sexist and result from male-dominated institutional practices. *See id.* at 32.

92. *Id.* at 36, 38.

93. *Id.* at 48.

94. *Id.* (discussing Brion’s analysis).

95. Olafson et al., *supra* note 89, at 10.

It can be argued that the very forces that prevented awareness of this issue in the past still obscure it today, for the sexual abuse of children has repeatedly surfaced into public and professional awareness in the past century and a half, only to be resuppressed by the negative reaction it elicits. The result has been a long history of cultural denial about criminal sexual behavior against children. As a society, we behave somewhat like those victims who protect themselves from their pain and terror by splitting off and sealing over all memory of childhood sexual traumas. There are some indications that this cultural disassociation is persisting in spite of substantial contemporary research on child sexual abuse.

*Id.* at 8 (citations omitted).

96. Psychiatric studies establish that “sociocultural forces account for many instances of clinical ‘hysteria.’” Caudill *supra* note 83, at 47 n.65.

97. The temporary anarchy that followed the collapse of the old discipline produced a state of mind bordering on hysteria among Southern white people. The first year a great fear of black insurrection and revenge seized many minds, and for a longer time the conviction prevailed that Negroes could not be induced to work without compulsion . . . . In the presence of these conditions the provisional legislatures established by President Johnson in 1865 adopted the notorious Black Codes. Some of them were intended to establish systems of peonage or apprenticeship resembling slavery.

C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 23 (2d ed. 1966).

98. Caudill, *supra* note 83, at 40 (quoting *Littleton v. Berbling*, 468 F.2d 389, 396 (7th Cir. 1972)); *id.* at 38 (“The three levels of hysteria identified by Freud reappear in judicial opinions, but with a slight modification . . . . The greatest danger, in this framework, is not the small group or mass hysteria handled successfully by judges, but a social hysteria in which the courts participate.”).

not be ignored; what unifies these reactions is that each is in defense of the established order, conscious or otherwise. After all, it was even Freud's "impression . . . that there could be powerful mental processes which nevertheless remained hidden from . . . consciousness."<sup>99</sup>

In modern psychoanalysis, the trauma associated with incest is a form of Post Traumatic Stress Disorder (PTSD).<sup>100</sup> Even though the symptomology is identical, the trauma experienced by incest survivors is not usually treated as someone experiencing PTSD, but as something quite different.<sup>101</sup> Other symptoms are

assumed to have contributed to her problem, in particular because of the interpersonal locus of her distress . . . ; the latter is almost always seen as the innocent victim of a random event. . . .  
. . . 'Real' trauma is . . . only that form of trauma in which the dominant group can participate as a victim rather than as the perpetrator or etiologist of the trauma.<sup>102</sup>

The rationales for sexual taboos for incest and those for anti-miscegenation were historically understood in parallel, yet intertwined, to the point of being one in the same. In the history of psychoanalysis, misogynistic, psychological misinformation about incest<sup>103</sup> contributes to the inadequate attention and care provided to its victims today. Additional layers of "otherness" (including race, poverty or same gender category) in this dynamic of social perception countenances the belief in its rarity as well as endorses social disinterest in its commission. In an effort to maintain the appearance of the social order, society protects the image and standing of fathers, especially white males with property, as the protector. Sexual stereotypes of black women<sup>104</sup> serve the purpose of blame, and those of black men serve as the foil<sup>105</sup>

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99. *Id.* at 50 (quoting SIGMUND FREUD, AN AUTOBIOGRAPHICAL STUDY 30 (A. Strachey trans., 1952)).

100. Brown, *supra* note 90, at 100-01.

To deny that [these] . . . experiences of trauma, are in fact traumatic, and to insist that only the disordered and diseased would respond to such treatment with severe distress, sends a message that oppression, be it based on gender, class, race, or other variables, is to be tolerated; that psychic pain in response to oppression is pathological, not a normal response to abnormal events.

*Id.* at 105.

101. *Id.*

102. *Id.* at 102 (citation omitted).

103. See *supra* Part III.

104. Cf. Wriggins, *supra* note 10, at 120-21 (discussing the sexual stereotypes of black women's promiscuity and the way in which their rapes by white men were largely ignored).

105. The rape of white women by black men has been the historical focus of rape in this country, grounded in concepts of power, fear, property and violence. See Amii Larkin Barnard, *The Application of Critical Race Feminism to the Anti-Lynching Movement: Black Women's Fight Against Race and Gender Ideology, 1892-1920*, 3 UCLA WOMEN'S L.J. 1, 1 (1993);

for the presumed stature and benevolence of the white male. Old legal prohibitions codifying “moral” codes, coupled with selective enforcement, enabled the actual exercise of power.<sup>106</sup> The protection of the ideals surrounding the patriarchal father is also one legitimate theory for interpreting Freud’s apparent change in understanding regarding hysteria. There is an apparent collective hysteria and denial surrounding the perpetration of incest, yet a simultaneous common knowledge and masked acceptance.

The persistent suppression of the awareness of sexual abuse has the most immediate detriments for individual victims. On a societal level, the collective denial and pathology serves the purpose of maintaining the social order and our perceptions of the truth. We are taught to buy into the correctness of the status quo and believe that those who hold power do so for the general welfare; thus, we often buy into our own victimization.<sup>107</sup> Regarding this collective denial, a scholar of psychology postulates:

We can be spectators, titillated by the thrill of risk, safe behind our imaginary psychic barriers; or we can watch in horror as trauma happens to others but reassure ourselves that we are not next because we are safe so long as we do not protest, do not stick out our necks and ‘make’ ourselves into the target. We can ignore the institutions of the society that appear to privilege us as long as we pretend that we will not be next.<sup>108</sup>

## CONCLUSION

Today, the “Jerry Springer”<sup>109</sup> vaudeville makes poverty/low-brow society into spectacle and entertainment such that we can publicly acknowledge the existence of incest (amongst the “great unwashed”) yet continue to ignore it. It has become a new and modern form of openly obscuring what may be real victimizations. Part of this

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Coramae R. Mann & Lance H. Selva, *The Sexualization of Racism: The Black as Rapist and White Justice*, 3 W. J. BLACK STUD. 168, 168 (1979); Wriggins, *supra* note 10, at 116-17.

106. *See supra* notes 69-81 and accompanying text.

107. *See Brown, supra* note 90, at 106 (“If we maintain the myth of the willing victim, who we then pathologize for her presumed willingness, we need never question the social structures that perpetuate her victimization.”).

108. *Id.* at 108 (citations omitted).

109. The Jerry Springer Show and similar shows, such as the Ricki Lake Show or the Maury Show, received high ratings in their prime for prominently exhibiting controversial topics, such as incest, and presenting them in a deliberately salacious manner.

new *transparent obscurity* is the “racing”<sup>110</sup> of poverty<sup>111</sup> and making whites without money, power, or influence into the “other.”

In a country so steeped in the myth of classlessness, in a culture where we are often at a loss to explain or understand poverty, the white trash stereotype serves as a useful way of blaming the poor for being poor. The term white trash helps solidify for the middle and upper classes a sense of cultural and intellectual superiority. . . . “white trash” is not just a classist slur – it’s also a racial epithet that marks out certain whites as a breed apart, a dysgenic race unto themselves.<sup>112</sup>

Jerry, in fact, deliberately stays “above the fray,” even making intellectual analyses and insights at the end of the show. Thus, we continue the public spectacle of incest that allows the collective denial of its prevalence.

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110. Annalee Newitz & Matt Wray, *Introduction to WHITE TRASH: RACE AND CLASS IN AMERICA* 1-2 (Matt Wray & Annalee Newitz eds., 1997) (discussing John Water’s statements about the social construct, “white trash”); Constance Penley, *Crackers and Whackers: The White Trashing of Porn*, in *WHITE TRASH: RACE AND CLASS IN AMERICA* 89, 90 (Matt Wray & Annalee Newitz eds., 1997) (“A Southern white child is required to learn that white trash folks are the lowest of the low because socially and economically they have sunk so far that they might as well be black.”).

111. One must also wonder if this dynamic is also what enabled, over a period of some years, Jerry Sandusky to allegedly abuse young, “underprivileged” boys; and perhaps subconsciously justify non-action on the part of Penn State or local authorities. See *Penn State (Sandusky Sex Abuse Scandal)*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/organizations/p/pennsylvania\\_state\\_university/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/p/pennsylvania_state_university/index.html) (last updated Jan. 19, 2012). Some commenters believe the media’s use of “underprivileged” in the reporting of this story is code for black or African American. E.g., Jen Marshall Duncan, *Penn Scandal: Was Race a Factor?*, MULTICULTURAL FAMILIA (Nov. 12, 2011), <http://www.multiculturalfamilia.com/2011/11/12/penn-state-scandal-was-race-a-factor/>; Dr. Boyce Watkins, *How Many of Those Penn State Victims Were Black?*, NEWS ONE (Nov. 16, 2011, 6:10 PM), <http://newsone.com/newsone-original/boycewatkins/penn-st-molestation-victims-black/>; *Were Those Penn State Victims Black?*, BLACK YOUTH PROJECT (Nov. 17, 2011, 1:30 AM), <http://www.blackyouthproject.com/2011/11/jerry-sandusky-penn-state-black-victims/>; cf. Berry, *supra* note 13 at 49-78; BURNARD, *supra* note 13, at 57, 63 (discussing the sexual abuse of boys by adult males).

112. Newitz & Wray, *supra* note 110, at 1-2.

# The “First Family Effect.”\* “Love on Top”\*\*

LENESE C. HERBERT\*\*\*

During the last fifty years, heterosexual marriage rates have declined in the United States.<sup>1</sup> For heterosexual couples, marriage

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\* The title is a slight play on the concept of “The Obama Effect,” described in a number of articles as, essentially, the unintended, mostly positive, post-November 4, 2008 effects of electing the first black President of the United States. Since that historic day, “The Obama Effect” has appeared as the title of a number of articles, in whole or in part. *E.g.*, Sam Dillon, *Study Sees an Obama Effect as Lifting Black Test-Takers*, N.Y. TIMES, Jan. 22, 2009, at A15. (documenting the disappearance of standardized test performance gap between white and black test-takers since the election of President Obama); James Verini, *Is There an ‘Obama Effect’ on Crime?*, SLATE (Oct. 5, 2011, 2:59 PM), [http://www.slate.com/articles/news\\_and\\_politics/crime/2011/10/the\\_obama\\_effect\\_a\\_surprising\\_new\\_theory\\_for\\_the\\_continuing\\_crim.single.html](http://www.slate.com/articles/news_and_politics/crime/2011/10/the_obama_effect_a_surprising_new_theory_for_the_continuing_crim.single.html) (exploring the nascent, but growing, belief that the decline in black crime is the result of the election of President Obama). The rationale is simple: “[T]he election of the first black president has provided such collective inspiration that it has changed the thinking or behavior of would-be or one-time criminals.” *Id.* Of course, “[t]he effect is not yet quantifiable, but some very numbers-driven researchers believe it may exist.” *Id.*

\*\* “Love on Top” is the name of a 2011 celebratory anthem that praises a triumphant couple’s love and strength to thrive in the face of life’s vicissitudes—as evidenced by the successively increasing octaves/keys in which each stanza is delivered. *See* Sarah Anne Hughes, *Watch Beyoncé’s “Love on Top” Video*, WASHINGTON POST (Oct. 17, 2011), [http://www.washingtonpost.com/blogs/celebrity/post/watch-beyonces-love-on-top-video/2011/10/17/gIQActXWrL\\_blog.html](http://www.washingtonpost.com/blogs/celebrity/post/watch-beyonces-love-on-top-video/2011/10/17/gIQActXWrL_blog.html) (describing the song’s final chords as “progressing to the heavens”). Pop superstar, Beyoncé, also known as “Mrs. Knowles-Carter,” performed “Love on Top” during the nationally televised 2011 Music Television Video Music Awards. Earlier in the evening and prior to the show’s official start, Mrs. Knowles-Carter announced that she and her husband, hip-hop mogul, Sean “Jay-Z” Carter, were expecting their first child together. At the conclusion of Mrs. Knowles-Carter’s performance, she unbuttoned her jacket to reveal her “baby bump” and rubbed it for effect. *See, e.g.*, Cindy Clark, *The Breakout Star at MTV VMAs: Beyoncé’s Baby Bump*, USA TODAY (Aug. 29, 2011, 4:37 PM), <http://www.usatoday.com/life/music/awards/mtvmusicawards/story/2011-08-29/The-breakout-star-at-MTV-VMAs-Beyonceacutes-baby-bump/50170600/1>. Although “[m]uch hip-hop culture promotes hedonistic materialism, making everything associated with gaining wealth embody the essence of cool,” this, “uncool” traditional behavior caused the preternaturally cool dad, the couple’s hip friend in fame, Kanye West, and, apparently, the Internet (via the social media microblogging website, Twitter) to go wild. BELL HOOKS, *SALVATION: BLACK PEOPLE AND LOVE 15* (William Morrow ed., 1st ed. 2001); *see, e.g.*, Zoe Fox, *Beyoncé Music Video Shows Off Twitter Record-Setting Baby Bump*, MASHABLE (Oct. 7, 2011), <http://mashable.com/2011/10/07/beyonce-music-video-shows-off-twitter-record-setting-baby-bump/>. Accordingly, viewers of the “rub felt ‘round the world” flooded Twitter, with more Tweets about the Knowles-Carter baby news and bump rub than during news of the Japanese tsunami or President Obama’s prime-time announcement of the death of Osama bin Laden. *Id.*

seems “a less universal and less stable family form.”<sup>2</sup> Marriage seems no longer to be the “surest route to financial security for women.”<sup>3</sup>

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Beyoncé and her husband, Jay-Z, have, in fact, frequented the White House during Obama's presidency. See, e.g., Rahman Dukes, *Jay-Z, Beyoncé Meet President Obama During White House Visit*, MTV NEWSROOM (Mar. 5, 2010, 10:50 AM), <http://newsroom.mtv.com/2010/03/05/jay-z-beyonce-barack-obama/> (describing a 2010 White House visit by Mr. and Mrs. Carter that included photographs of Mr. Carter seated directly beneath the Presidential seal and Mrs. Knowles-Carter seated to his immediate right); Jennifer Epstein, *Inside Obama's 50th Birthday Bash*, POLITICO (Aug. 5, 2011, 7:43 AM), <http://www.politico.com/news/stories/0811/60722.html> (listing Jay-Z among other high-profile White House guests invited to attend a celebration of President Obama's fiftieth birthday); see also Kori Schulman, *Tonight at the White House State Dinner: Beyoncé and Rodrigo y Gabriela*, WHITE HOUSE BLOG (May 19, 2010, 2:24 PM), <http://www.whitehouse.gov/blog/2010/05/19/announcing-tonight-s-entertainment-beyonce-and-rodrigo-y-gabriela> (noting the Carters' presence and Mrs. Knowles-Carter's performance at President Obama's State Dinner for Mexican president, Felipe Calderon and his wife). Additionally, on inauguration night 2009, Beyoncé sang the song to which the First Lady and President Obama enjoyed their official first dance of his term. See, e.g., *The Obamas First Inaugural Dance To Beyoncé*, HUFFINGTON POST (Jan. 20, 2009), [http://www.huffingtonpost.com/2009/01/20/the-obamas-first-inaugura\\_n\\_159522.html](http://www.huffingtonpost.com/2009/01/20/the-obamas-first-inaugura_n_159522.html). As a member of Generation Jones, see *infra* note 27, I would be remiss in failing to note that Mrs. Knowles-Carter's “baby bump” rub occurred on the forty-eighth anniversary of the March on Washington and Martin Luther King, Jr.'s speech on The National Mall at the Lincoln Memorial. I would also be remiss in failing to note that the Dedication of the Martin Luther King, Jr. Memorial was also to have occurred on The National Mall on this same date, August 28, 2011, in commemoration of the forty-eighth anniversary of the March on Washington.

\*\*\* Visiting Professor of Law, Howard University School of Law, Spring 2012; Professor of Law, Albany Law School. The author thanks Howard University School of Law Professor, Reginald Robinson, who invited her to participate in this Symposium and successfully overcame her reluctance to write in such an unfamiliar and challenging territory. The author also thanks the members of the *Howard Law Journal*, who, undoubtedly, wondered what to make of her draft article, yet, managed to edit it with a careful eye and precocious ear. Professor Frank Rudy Cooper's “Who's the Man?": *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. OF GENDER AND L. 671 (2009), in part, continues to inform certain nascent sensibilities of the author and, accordingly, this Article. This Article is dedicated to the author's father, Thomas H. Herbert, who will have no idea why, but nevertheless, be pleased.

1. See *The Decline of Marriage And Rise of New Families*, PEW RESEARCH CTR., 1, 21 (Nov. 18, 2010), <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/3/#iii-marriage> (“Some 72% of all adults in the United States were married in 1960. By 2008, just 52% were.”). See also, Sharon Jayson, *Divorce Declining, But So Is Marriage*, USA TODAY, July 18, 2005, at 3A (explaining that recent studies show that U.S. marriage rates have declined fifty percent since 1970, from “76.5 per 1,000 unmarried women to 39.9”); Algernon Austin, *Less Money, Less Marriage*, WORKING ECONOMICS, ECONOMIC POLICY INSTITUTE BLOG (Sept. 28, 2011, 3:17 PM), <http://www.epi.org/blog/money-marriage/> (“[F]inancially insecure men are less likely to marry.”). Over the past three decades, as more of U.S. wealth and income remain “concentrated among America's rich,” the remainder of Americans, especially men “have been particularly hard hit”:

Half of male workers have experienced stagnating or declining wages over the last 30 years. For Latino and African American men, it is more than half. As a larger share of men are pushed down the earnings scale, their likelihood of marrying declines. The decline of marriage is a collateral consequence of the growing economic inequality over the last 30 years.

*Id.*

2. R. Richard Banks & Su Jin Gatlin, *Going Back to Class? African American Intimacy: The Racial Gap in Marriage*, 11 MICH. J. RACE & L. 115, 115 (2005).

3. See David Crary, *More Men Get Economic Boost From Marriage*, ASSOCIATED PRESS, Jan. 19, 2010, at 1.



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Instead, men, “compared with their 1970 counterparts, are married to women whose education and income exceeds their own, and a larger share of women are married to men with less education and income.”<sup>4</sup>

Americans are also becoming increasingly childless across multiple demographics.<sup>5</sup> In 2010, only one-third of American households had children.<sup>6</sup> Social pressures to bear children—particularly when there are so many children available via domestic and international adoption<sup>7</sup>—seemed to have diminished; simultaneously, educational, employment, and contraception options have increased.<sup>8</sup> Statistics show that “[t]here were 1.9 million childless women ages 40-44 in 2008, compared with nearly 580,000 in 1976.”<sup>9</sup> The most educated women of all sorts are among the least likely to have a child and, by race and ethnic group, white women are the least likely.<sup>10</sup>

Although statistics and studies indicate that these changes are societal, strangely, corporate news media outlets have focused on black women, portraying them “as grievous anomalies.”<sup>11</sup> Not surprisingly, prior to the election of President Barack Hussein Obama and the elevation of his wife, Michelle, to the position of First Lady of the United States, few cared about the personal and romantic lives of black women.<sup>12</sup> How deliciously and richly ironic, then, to watch—now that President and Mrs. Obama live the heretofore unimagined success of

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4. *Id.*

5. “Childless women tend to be somewhat more educated than women who have borne children. Childless women are more likely to hold an advanced degree (13% vs. 9%) and a college degree (26% vs. 20%).” Gretchen Livingston & D’Vera Cohn, *Childlessness Up Among All Women; Down Among Women with Advanced Degrees*, PEW RESEARCH CENTER 6 (June 25, 2010), <http://www.pewsocialtrends.org/2010/06/25/childlessness-up-among-all-women-down-among-women-with-advanced-degrees/>. However, nearly twenty percent of all American women, irrespective of race or ethnicity, have never borne a child, compared to ten percent in the 1970s. *See id.* at 1.

6. *See* Haya El Nasser & Paul Overberg, *How America Changed*, USA TODAY (Aug. 9, 2011, 11:10 PM), [http://www.usatoday.com/NEWS/usaedition/2011-08-10-1Acensusturning-points-CV-\\_CV\\_U.htm](http://www.usatoday.com/NEWS/usaedition/2011-08-10-1Acensusturning-points-CV-_CV_U.htm).

7. *See* Livingston & Cohn, *supra* note 5.

8. *See id.*

9. *See id.*

10. *See id.*

11. *See* Nadra Kareem Nittle, *The Media Thinks Single Black Women Have All the Problems*, CHANGE.ORG (June 29, 2010), <http://news.change.org/stories/the-media-thinks-single-black-women-have-all-the-problems> (“The same is true about marriage rates among women, but that hasn’t stopped the media from portraying single black women as grievous anomalies.”); *see also id.* (“Too often, news stories about unmarried black women feign concern over the fate of black women, but simply serve up hateful stereotypes about the black community that paint black women as unlovable and black men as no-good and shiftless.”).

12. *See, e.g.*, Theresa Lasbrey, *Happy Black Women Would Be Bad for Media Business*, MADAMENOIRE.COM (June 8, 2010), <http://madamenoire.com/3450/happy-black-women-would-be-bad-for-media-business/>. Here, The Obama Effect is explained as such:

the American Presidency<sup>13</sup>—media outlets lament “the plight of black women now that black women are succeeding on their own terms[?]”<sup>14</sup> These media outlets seem to warn, “Black women, stop earning degrees and pursuing professional careers if you don’t want to end up childless and alone!”<sup>15</sup> As one commentator noted, such “would be comical if it weren’t so sad.”<sup>16</sup>

What is most startling about this warning is that those who are its subjects represent some of the most successful individuals known to this country.<sup>17</sup> These individuals, by and large, have played by

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You may have noticed that since the commencement of the Obama presidency and declarations of our ‘post-racial’ country, there have been numerous incidents that point to how race continues to matter and divide—it’s as if the Obama presidency rang an alarm.

President Obama, in being the first person of color elected into the U.S. presidency, fueled new possibility. Suddenly, children of color could dream of something as seemingly absurd as becoming president.

President Obama’s election had another surprising effect as the cameras exposed the interaction he has with his wife. During interviews pre- and post-election, you could see him look at Michelle Obama with open, unabashed desire & admiration. His chest would swell as Michelle addressed issues with the grace, precision and intelligence she wields so effortlessly.

And what does the media do to counter such a perfect and powerful example of a black woman—and her man—in love? They launch an anti-black woman campaign.

*Id.*; see also Diane Lucas, *The Media v. Black Women: The Peculiar Case of the Media’s Obsession with Unmarried Black Women*, FEMINISTE (June 21, 2010), <http://www.feministe.us/blog/archives/2010/06/21/the-media-v-black-women-the-peculiar-case-of-the-media%E2%80%99s-obsession-with-unmarried-black-women/> (citing, inter alia, “the Obama Effect” for the media’s incessant and overwhelmingly negative focus upon black women and their single status). One writer suggests that the media’s message to these women—notwithstanding the omnipresent images of President Barack and First Lady Michelle Obama—is an “anti-black woman campaign,” screaming to all who can see: “The Obamas are not the norm! Do not dream of this for yourself!” *Id.*

13. “It would be too trivial to say that [Mrs. Obama] is smashing stereotypes of black women, because the stereotypes are so flat, so one-sided, so unreal, that smashing them would be like punching a cloud.” DeNeen L. Brown & Richard Leiby, *The Very Image of Affirmation*, WASH. POST, Nov. 21, 2008, at C01. According to an overwhelming majority of television programming, “[t]here’s the stereotype of the powerful black woman, the aggressive black woman; there is the stereotype of the over-sexualized, overly sexed black woman; there is the stereotype of the mammy.” *Id.* At bottom, these images coalesce to convey the message “we’re all hot-tempered single mothers who can’t keep a man and . . . those of us who aren’t street-walking crack addicts are on the verge of dying from AIDS.” *Id.* See also Allison Samuels, *What Michelle Can Teach Us*, NEWSWEEK, Nov. 10, 2008, at 42. Samuels goes on to say that “[e]ven in the world of make-believe, black women still can’t escape the stereotype of being neck-swirling, eye-rolling, oversexed females raised by our never-married, alcoholic mothers.” *Id.*

14. Jeff Bolton, *Single Black Women: Admire Them and Leave Them Alone*, DALLAS SOUTH NEWS (May 3, 2010), <http://www.dallasouthnews.org/2010/05/03/single-again-young-black-women-admire-them-and-leave-them-alone/>.

15. Janell Hobson, *Scapegoating Black Women in a Recession*, MS. MAGAZINE BLOG (Aug. 25, 2011), <http://msmagazine.com/blog/blog/2011/08/25/scapegoating-black-women-in-a-recession/>.

16. Bolton, *supra* note 14.

17. For example, “black women already occupy a majority of the professional and managerial jobs among African Americans. Fifty years ago, women occupied less than a quarter of the professional and management jobs held by blacks. Today, they fill roughly 60 percent of such

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many—if not all—of polite society’s rules.<sup>18</sup> They have, largely, abstained from (too much) reckless sex, abhorred out-of-wedlock births (or limited themselves to a zero-population-growth worthy single child), obtained high grades, attended good schools, earned multiple degrees, and worked or created respectable, if not coveted, jobs.<sup>19</sup>

These women, as a group, attend church, mentor the young, support and honor elders, volunteer in charitable efforts, and assist family members in multiple ways.<sup>20</sup> They do not inhabit the neediest strata of our society<sup>21</sup> or populate our prisons.<sup>22</sup> Instead, they write books, plays, law review articles, and cultural essays. They are, overwhelm-

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jobs. Further, during the past three decades, the earnings of black female college graduates have increased *more than four times as much* as the earnings of their black male counterparts.” RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 42-43 (2011) (citations omitted); *see infra* notes 19-24 and accompanying text.

18. *See generally* NATALIE NITSCHKE & HANNAH BRUECKNER, YALE UNIV. CTR. FOR RESEARCH INEQUALITIES & LIFE COURSE, EXECUTIVE SUMMARY: OPTING OUT OF THE FAMILY? SOCIAL CHANGE IN RACIAL INEQUALITY IN FAMILY FORMATION PATTERNS AND MARRIAGE OUTCOMES AMONG HIGHLY EDUCATED WOMEN (2009), *available at* [http://www.yale.edu/sociology/faculty/pages/brueckner/Nitschke\\_brueckner\\_Executive%20summary.pdf](http://www.yale.edu/sociology/faculty/pages/brueckner/Nitschke_brueckner_Executive%20summary.pdf) (summarizing results of highly educated black women who, in the pursuit of higher education and professional careers, delay marriage and, as a result, childbirth, as they eschewed out-of-wedlock parenting, given the societal stigma associated with black single mothers. The researchers learned that, as a group, these highly educated black women were far more likely to abstain from sexual intercourse and practice celibacy (versus fornicate)); Brian Alexander, *Marriage Eludes High-Achieving Black Women*, MSN (Aug. 13, 2009, 8:31 AM), [http://www.msnbc.msn.com/id/32379727/ns/health-sexual\\_health/](http://www.msnbc.msn.com/id/32379727/ns/health-sexual_health/) (discussing findings that demographic and sociological “constraints” lead “many more [to be] celibate than . . . white women with similar education levels”).

19. *See* NITSCHKE & BRUECKNER, *supra* note 18; *see also, e.g., Fact Sheet: Professional Black Women*, BLACK CAREER WOMEN, <http://www.bcw.org/facts.shtml#Div50%20annual%20list> (last visited Nov. 4, 2011) (noting the creation of 405,200 African American women-owned businesses, which generated \$25 billion in sales and 261,000 jobs).

20. *See, e.g.,* Fact Sheet Professional Black Women, *supra* note 19 (noting 45% of African American women serve as the head of the household); National Black Church Initiative, *National Black Church Initiatives Invite African American Men Back to Church*, NATIONAL BLACK CHURCH 1, <http://www.naltblackchurch.com/pdf/blackmentochurch-plan.pdf> (last visited Nov. 4, 2011) (noting that 60% of church attendees are women). The initiative, which strongly urged men to return to church also asked in a pointed fashion: “If single black women are attending church regularly and following the guidelines that the church has put in place and the black men are not, what does this say about the future of the black family?” *Id.*; *see also* Janet Taylor, *Survival Tips for the Sandwich Generation*, GENCONNECT (Sept. 22, 2010), <http://www.genconnect.com/relationships/sandwich-generation-baby-boomers-tips-advice-caregiving/> (finding that those who belong to the “sandwich generation” are, themselves, wedged between older Baby Boomers and Generation Xers, and are increasingly required to take care of their children and parents). Although African Americans represent only 11% of this group, it seems that they experience more stress than others, given, among other factors that are encompassed in this group, “[m]ore single parent households, due to lower marriage rates among older African American Boomers” and more “[m]ulti-generations living in a single household—approximately [25%] of African American Boomers have children aged [twenty-one] or older living at home, and almost [10%] have grandchildren living with them.” *Id.*

21. “Notwithstanding the persistence of stereotypes equating race and poverty, more African Americans are middle-class than poor.” BANKS, *supra* note 17, at 10 (citation omitted). The

ingly, among our most responsible of citizens.<sup>23</sup> They raise, foster, and adopt others' unwanted children, pouring into the next generation resources, support, and emotional fortitude.<sup>24</sup> They have proven themselves to be the definition of Good Americans.<sup>25</sup>

This category of black women within a category of black people within the United States has largely been ignored by corporate media and popular culture until the U.S. presidential election of November 2008.<sup>26</sup> Accordingly, allow me to introduce you to those largely ignored by the chattering classes:<sup>27</sup> the black men and women of Gener-

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black middle class, "understood in terms of income, education, and sensibility," is growing more female. *Id.* at 107.

22. Although African American women are disproportionately represented in the population of American women inmates ("[t]he current rate is 149 women per 100,000 persons in the U.S. resident black population"), incarcerated women represent only 10% of the total inmate population. *See, e.g., id.* at 10; *see also* MELISSA V. HARRIS-PERRY, *SISTER CITIZEN* 322 n.35 (2011).

23. BANKS, *supra* note 17, at 107 (noting that black women, increasingly, "are part of an American mainstream" and the "black middle class . . . is becoming more female").

24. *See, e.g.,* John Blake, *Single Black Women Choosing to Adopt*, CNN (July 1, 2009), [http://articles.cnn.com/2009-07-01/living/bia.single.black.women.adopt\\_1\\_african-american-black-families-white-women?\\_s=PM:LIVING](http://articles.cnn.com/2009-07-01/living/bia.single.black.women.adopt_1_african-american-black-families-white-women?_s=PM:LIVING) (noting a trend of more single black highly educated women adopting children to raise without the benefit or assistance of a husband). "[A]necdotal reports by adoption agency personnel suggest that black women comprise nearly half of the single women who adopt children." BANKS, *supra* note 17, at 79 (citation omitted).

25. "Proven" is a deliberate choice. The history of the United States is rife with the maddening truth that despite their citizenship conferring upon their birth within this country, black Americans' status as being "Born in the USA" does not fully translate into being seen as American citizens, save for jurisdictional purposes when police and prosecutorial arms of the government seek to enforce criminal laws against them. The most recent and outrageous example evidences the race-based truth when President Obama was challenged regarding his status as an American citizen, deep into his presidency. Although his 2012 presidential campaign has created a joke and fundraising opportunity out of the shameful spectacle, *see, e.g., "Obama Jokes About 'Birther' Controversy at Fundraisers," HILL* (Apr. 27, 2011), <http://thehill.com/blogs/blog-briefing-room/news/158087-obama-jokes-about-birther-controversy-at-fundraisers>, such race-based challenges stand as a stark reminder to those inside and outside the U.S. that race-based differences and skin color biases are a reality for all non-whites within this country's borders, even if one triumphs against such challenges to rise to the levels of Harvard Law School graduate and *Law Review* Editor-in-Chief, U.S. Senator, Democratic Party Presidential Nominee and Candidate, and President of the United States of America.

26. John Lang writes:

Fifty-three million Americans are practically invisible. Almost nobody knows they exist. They're hardly aware of it, as a group, themselves. But they're out there—unrecognized, ignored, but maybe ready to claim their place.

Jonesers, they're called.

Generation Jones.

The U.S. Census Bureau doesn't know about this. Mainstream demographers mostly haven't given it a thought.

John Lang, *Generation Jones: Between the Boomers and the Xers*, CINCINNATI POST (Jan. 8, 2000), <http://web.archive.org/web/20050115184413/http://www.cincypost.com/news/2000/jones010800.html>.

27. One blogger cracked that Generation Jones is "a generation so lost that for most of its existence it didn't even have a name, until some sociologist guy came along to call us 'Generation Jones,' for reasons that are typically vague." Will Bunch, *Along Came "Jones": Why My*

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ation Jones.<sup>28</sup> Perhaps paying attention might be in order. Generation Jones was born between 1954 and 1965 (the mini-generation between the Baby Boomers and Generation X); its members are estimated at approximately fifty-three million Americans.<sup>29</sup> Generation Jones members—especially the women—are responsible for the historic 2008 presidential election of Barack Obama, himself a member of Generation Jones.<sup>30</sup> Generation Jones voters are responsible for the elevation of Michelle Obama, a Generation Jones member, from the wife of a U.S. senator to the position of the First Lady of the United States.

On its face, the name “Jones” is shockingly dull,<sup>31</sup> leading some to believe that the rather mundane moniker—if indicative of worth—hints at why this generation has, heretofore, been ignored. That belief would be wrong.<sup>32</sup> A closer examination of the etymology allows a more poignant understanding to emerge.

The name ‘Generation Jones’ derives from a number of sources, including our historical anonymity, the ‘keeping up with the Joneses’ competition of our populous birth years, and sensibilities coupling the mainstream with ironic cool. But, above all, the name borrows from the slang term ‘*jonesin*’ that we as teens popularized to broadly convey any intense craving.<sup>33</sup>

“Jones” and “Jonesing” were persuasive themes that surfaced and defined the pop-culture childhoods of those born between 1954 and

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*Generation Isn't Saving the World*, PHILADELPHIA DAILY NEWS (June 8, 2010, 8:25 AM), [http://www.philly.com/philly/blogs/attytood/Along\\_came\\_Jones\\_Why\\_my\\_generation\\_isnt\\_saving\\_the\\_world.html](http://www.philly.com/philly/blogs/attytood/Along_came_Jones_Why_my_generation_isnt_saving_the_world.html).

28. “Generation Jones” has been defined as the population born between the years 1954 and 1965. Joe McKendrick, *Understanding ‘Generation Jones’ and Other Mini-Generation Gaps*, SMARTPLANET (Jan. 15, 2010, 8:20 AM), <http://www.smartplanet.com/blog/business-brains/understanding-8216generation-jones-and-other-mini-generation-gaps/4439>. These individuals, at the printing of this article, range in age from forty-six to fifty-seven years of age. *Id.* Jonathan Pontell first defined and described this group of Americans, characterizing them as the generation “stuck ‘between Woodstock and Lollapalooza.’” *Id.*

29. *Id.*

30. President Obama was born in 1961, “[fifteen] years after [President Bill] Clinton and [nineteen] years before Chelsea [Clinton].” Jonathan Pontell, *Stuck in the Middle*, USA TODAY, Jan. 27, 2009, at 9A.

31. *But see* Susan McDonald, *Lost Generation Finds Its Voice*, SYDNEY MORNING HERALD (June 21, 2009), <http://www.smh.com.au/lifestyle/life/lost-generation-finds-its-voice-20090621-csc8.html> (explaining why Jonesing is not a boring word, but rather a “hip” or “cool” one that means passion and yearning).

32. *Id.* (describing Generation Jones as “lost,” given that it is “caught between two demographics,” Baby Boomers and Generation X). “[T]hey were lost in the shuffle and were characteri[z]ed by anonymity and unfulfilled expectations.” *Id.*

33. Pontell, *supra* note 30 (emphasis added).

1965.<sup>34</sup> The music of the time sang of the jones.<sup>35</sup> Artists spoke of jonesing.<sup>36</sup> Society embraced these bits of vernacular supposedly employed first by urban Black America.<sup>37</sup> “Jones” and “Jonesing” both express an intense longing for something or someone:

The Jones runs deep in us. It arose from our 1960s childhoods. While the Boomers were out changing the world, Jonesers were still in elementary school-wide-eyed, not tie-dyed. That intense love-peace-change-the-world zeitgeist stirred our impressionable hearts. We yearned to express our own voice. By the time we came of age and could take the stage, though, a decade of convulsions had left the nation fatigued. During the game we’d been forced to watch from the sidelines, and passage into college and careers came only after the final gun had long since sounded.

The Boomers had their opportunity, and the GenXers weren’t around soon enough to bear witness.<sup>38</sup> Neither was left jonesin’. But,

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34. See Lang, *supra* note 26.

35. Examples of the music include “Love Jones” (1972), “I’ve Got a Jones on You, Baby” (1977), and “Jones Crusher” (1979). *Id.* “Me and Mrs. Jones,” written by Kenny Gamble, Leon Huff, and Cary Gilbert, proved a number one hit for singer, Billy Paul, when it was released in 1972. See, e.g., *Billy Paul: Biography*, BILLBOARD.COM CHARTS, <http://www.billboard.com/artist/billy-paul/5387#/artist/billy-paul/5387> (last visited Nov. 12, 2011) (summarizing Billy Paul’s biography and success of, *inter alia*, “Me and Mrs. Jones”); Jasmine Johnson, *Black Music Month Spotlight: Gamble and Huff*, CENTRICTV.COM (June 14, 2011, 9:30 AM), <http://blogs.centrictv.com/music/soulsessions/black-music-month-spotlight-gamble-huff/> (highlighting the success of legendary songwriters Kenny Gamble and Leon Huff which includes “Me and Mrs. Jones”). In the song, Paul sings of his surreptitious and illicit love affair with “Mrs. Jones,” with whom he has “a thing going on,” that “both [he and Mrs. Jones] know that it’s wrong, but it’s much too strong to let it cool down now.” See Michael Verity, *Going for the Gold: Billy Paul*, WNEW.COM (Sept. 29, 2011, 9:00 PM), <http://wnew.radio.com/2011/09/29/going-for-the-gold-billy-paul/>; see also BILLY PAUL, *Me and Mrs. Jones*, on 360 DEGREES OF BILLY PAUL (CBS Records 1972).

36. E.g., Susan Shapiro, *Love Is the Drug, and I’m Jonesing For a Hit*, NEW YORK OBSERVER (Mar. 17, 2003, 12:00 AM), <http://www.observer.com/2003/03/love-is-the-drug-and-im-jonesing-for-a-hit/> (“Love Is the Drug, and I’m Jonesing for a Hit” is a headline depicting the writer’s complaint regarding her husband’s lack of an aggressive sexual appetite.); see Christopher Windham, *FUBU Founder Offers Advice, Personal Stories on Succeeding as an Entrepreneur*, HUMAN NATURE MAGAZINE (Nov. 8, 2010, 3:38 PM), [http://www.humannaturemag.com/index.php?option=com\\_content&view=article&id=145:fubu-founder-offers-advice-personal-stories-on-succeeding-as-an-entrepreneur-&catid=36:business-a-health&Itemid=643](http://www.humannaturemag.com/index.php?option=com_content&view=article&id=145:fubu-founder-offers-advice-personal-stories-on-succeeding-as-an-entrepreneur-&catid=36:business-a-health&Itemid=643); see also William Safire, *The Way We Live Now: On Language; Jonesing*, N.Y. TIMES, May 11, 2003, § 6, at 24.

37. The New York Times author, William Safire, credits two black sources for his understanding of the etymology of “Jonesing” and “Jones” when it first appeared in the pages of The New York Times: Alva V. John and Charlayne Hunter-Gault. See Safire, *supra* note 36 (noting that the term’s use was employed by John in a 1970 New York Times profile of his life that was written by Hunter-Gault, who used a parenthetical to explain that “[a jones is a craving brought on by drug usage]” after John used it in a sentence).

38. See Pontell, *supra* note 30.

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the actual children of the 1960s yearned for something more. Our unrequited idealism has bubbled beneath the surface ever since.<sup>39</sup>

When one is jonesing, one covets. When one is keeping up with the Joneses, one’s covetous consumerism is activated, striving to acquire that which society deems prestigious, valuable, and powerful.<sup>40</sup> Given the era in which their parents reared Jonesers, we were expected to become high achievers:

{G}iven huge expectations as children in the Sixties, which was arguably the height of post World War II confidence’ . . . ‘The sky-is-the-limit culture was more than a promise, it was a commitment. We were shown secure futures in which we would not only be financially prosperous but able to live our lives in self-fulfillment beyond money.’<sup>41</sup>

Even now, despite aging exteriors, Generation Jones consists of those who “are much more open to influence at this point in their lives. They are very open to change, and considering change. They are much more open to being persuadable, and specifically open to being persuadable to trying new things.”<sup>42</sup> At the same time, Jonesers are also deadly practical; that “practical idealism was created by witnessing the often-unrealistic idealism of the 1960s.”<sup>43</sup> Accordingly, Jonesers’ “non-ideological pragmatism allows us to resolve intra-Boomer skirmishes and to bridge that volatile Boomer-GenXer divide. We can lead.”<sup>44</sup>

Lead we did. Jonesers were the most significant group of voters who ushered in President Obama’s historic 2008 election victory.<sup>45</sup> The brilliant Obama campaign slogan, “Change You Can Believe In,”

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39. *Id.* “Jonesin’ for” or “having a Jones for” were popular slang terms that permeated the culture. The term was used to communicate intense yearning and craving, a passionate need that seemed to brush up against addictive levels. In current slang use, then, “jonesing has evolved from its narcotics-addiction base to a general lusting, craving or yearning.” *See* Safire, *supra* note 37.

40. For example, my Albany Law colleague, Paul Finkelman, discusses the covetousness inherent in “keeping up with the Joneses” as “a tried and true aspect” of a capitalist, consumerist American society, evidenced by, *inter alia*, a tax code that “subsidizes” coveting neighbors’ houses, as well as “whole industries” that are “predicated on the idea of wanting what your neighbor has.” *Id.*

41. Lang, *supra* note 26 (quoting Jonathan Pontell).

42. McKendrick, *supra* note 28 (quoting Jim Welch).

43. Pontell, *supra* note 30.

44. *Id.* In fact, Generation Jones member, President Obama, leader of, this, the most powerful nation in the world “has The Jones. It permeates his biography and his philosophy. It’s a crucial piece of his identity. His message and approach reverberate with GenJones themes.” *Id.*

45. African American “women voters had provided candidate Obama’s margin of victory in many crucial primary wins, and they had helped him carry North Carolina, Virginia, Michigan, Maryland, and other states in the general election.” HARRIS-PERRY, *supra* note 22, at 270.

was, of course, manna to many Jonesers' spirits, as it deftly evoked the practical idealism of the Jonesers' younger years. Our ears—nay, our hearts—recognized and responded to a shared longing of the slogan's promise.<sup>46</sup>

This deeply emotional and intellectual idealism is one to which a number of black Jonesers still hold firm.<sup>47</sup> After having been reared in functioning, newly integrated, but still largely self-contained African American worlds<sup>48</sup> and desegregating many a classroom, neighborhood, friendship circle, office, and event,<sup>49</sup> black Jonesers discovered what their parents and extended family members taught: we as a people are just as good as anyone else, deserve as much as anyone else, and are not to settle for less.<sup>50</sup> The brave new world was ours.<sup>51</sup> For black Jonesers, this was the original F.U.B.U.,<sup>52</sup> the substance of what their parents sought and the values for which they sacrificed: for us, by us.<sup>53</sup> Black Jonesers are what centuries of chattel

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46. See Bennet Kelley, *Obama and Generation Jones' Moment*, OPED NEWS (Mar. 25, 2008, 11:28 PM), [http://www.opednews.com/articles/opedne\\_bennet\\_k\\_080325\\_obama\\_and\\_generation.htm](http://www.opednews.com/articles/opedne_bennet_k_080325_obama_and_generation.htm) (characterizing, then, Senator Obama's campaign as the first to embody "the Generation Jones zeitgeist" and the President as "the archetype of the Jonesers' President").

47. HOOKS, SALVATION, *supra* note \*\*, at 156 ("[R]emembering that white supremacist thinking is always challenged by loving unions between black males and females sheds light on why there have been so many obstacles placed in the path of such unions.").

48. See Ta-Nehisi Coates, *American Girl*, ATLANTIC, Jan./Feb. 2009 (characterizing Michelle Obama's familial home and formative Chicago, IL neighborhood as a "cocoon").

49. Kelley, *supra* note 46 ("Jonesers went to integrated schools and dealt with the conflict between the ideal of a non-racial society passed to them by the Boomers and a society that still believed it mattered.").

50. See David Remnick, *The Joshua Generation*, NEW YORKER, Nov. 17, 2008, [http://www.newyorker.com/reporting/2008/11/17/081117fa\\_fact\\_remnick](http://www.newyorker.com/reporting/2008/11/17/081117fa_fact_remnick). Even President Obama's white mother "emphasized, even sentimentalized, blackness to her son," so much so, that, "[t]o her, 'every black man was Thurgood Marshall or Sidney Poitier; every black woman Fannie Lou Hamer or Lena Horne. To be black was to be the beneficiary of a great inheritance, a special destiny, glorious burdens that only we were strong enough to bear.'" *Id.* (quoting BARACK H. OBAMA, *DREAMS FROM MY FATHER: A STORY OF RACE AND INHERITANCE* 51 (reprt. ed. 2007)).

51. See OBAMA, *supra* note 50, at 51.

52. FUBU is an African American owned urban sportswear company started in 1992 by five young black men from Queens, NY. *Fubu Boo-Boo*, SNOPE.S.COM, <http://www.snopes.com/business/names/fubu.asp> (last updated June 1, 2011). Its original name was an acronym for "For us; By us," which defined the line of merchandise as designed by African Americans for African Americans. *Id.* Although intended only to communicate positivity, some regarded the name as "a declaration of black racism, an exclusionary bit . . . that effectively warned off anyone not of color from the raiment." *Id.*

53. Carla D. Pratt, *Way to Represent: The Role of Black Lawyers in Contemporary American Democracy*, 77 FORDHAM L. REV. 1409, 1431 (2009) (explaining, e.g., how older blacks reared children to achieve and maintain racial interconnectivity, pride, and obligation to other African Americans almost solely based on racial identity). Professor Pratt's parents, for instance:

definitely taught by example, and their teaching was: 'You serve the black community.'  
My father and both grandparents were attorneys and they served the black community



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slavery intended to obscure and extinguish. Black Jonesers are what segregation and Jim Crow were supposed to thwart and undermine.<sup>54</sup>

But, who are these black Jonesers? Jonathan Pontell, the cultural historian and marketing consultant credited with naming this generation, explains that members of Generation Jones “are practical idealists, forged in the fires of social upheaval while too young to play a part.”<sup>55</sup> But, what does that mean, particularly for black Jonesers? In short, the generation that produced Barack Obama and Michelle Robinson were never reared to be ordinary,<sup>56</sup> self-deprecating, or fearful.<sup>57</sup> They were reared to be both black and proud.<sup>58</sup>

As such—and one might imagine, despite themselves—black Jonesers remain somewhat suspended in the amber of post-Civil Rights “Black Is Beautiful” tenets.<sup>59</sup> These black Jonesers, especially

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where I grew up and I know they took cases pro bono. That’s just what you do, and you don’t say no to people ‘cause they don’t have money and you don’t say no to people ‘cause you want to make more money and you give by being leaders in the community and speaking in the community for or against different things that are going on and also if at all possible you put your kids through school. That’s giving back.

*Id.*

54. See Kelley, *supra* note 46.

55. Pontell, *supra* note 30.

56. Ta-Nehisi Coates confessed to being stunned while listening to Michelle Obama’s recounting of her less than tragic, powerfully optimistic Joneser youth:

In all my years of watching black public figures, I’d never heard one recall such an idyllic youth. Bill Cosby once said, ‘African Americans are the only people who do not have any good ol’ days,’ and for years the rule was that all our bios must play on a dream deferred, must offer a nod to dilapidated public housing and mothers scrubbing white women’s floors. But Obama waved off Richard Wright. Instead, the blues she sang was the ballad for the modern woman.

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I was waiting on slave narratives and oppression. I was looking for justice and the plight of the poor. Instead, I got homilies on the sainted place of women in American society. I got Michelle saluting and then ribbing her mother, who was seated in the audience. I left that ballroom thinking—as always—of the DuBoisian veil, the dark filter through which African Americans view their countrymen, and mulling the split perceptions of Michelle Obama. For all her spinning-out of a quintessential Horatio Alger tale, remixing black America into another ethnic group on the come-up, many Americans saw her largely through the prism of her belated, and wanting, expression of American pride.

Coates, *supra* note 48.

57. See Remnick, *supra* note 50 (“To be black was, for him, as much a matter of aspiration as of inheritance.”).

58. See Coates, *supra* note 48. “If you’re looking for the heralds of a ‘post-racial’ America, if that adjective is ever to be more than a stupid, unlettered flourish, then look to those, like Michelle Obama, with a sense of security in who they are—those black or white, who hold blackness as more than the losing end of racism.” *Id.* (“[characterizing the South Side of Chicago, IL as] one of the few places in the country where African Americans could utter the mantra ‘Black and proud’ without a hint of irony”). I submit there were others, including, but not limited to, Washington, D.C. and its Maryland suburb of Prince George’s County, M.D.

59. “‘Black is beautiful’ may sound like a cliché today, but it was a brave and dramatic declaration in the 1960s.” T. Alexander Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1083 n.104 (1991). “They were able to take the term ‘black’—which for more than

women,<sup>60</sup> revere the First Family's heteronormative realization of the quintessential strong, black family.<sup>61</sup> For these black Jonesers, the Obama Family represents the power of black love at its finest and on top of the world:<sup>62</sup>

For all the African Americans who have occupied the spotlight—from Oprah Winfrey to Bill Cosby, Michael Jordan to Tiger Woods, Condoleezza Rice to Colin Powell—virtually none have done so as a couple, much less been as prominent as the president and first lady. Their residency at 1600 Pennsylvania Avenue not only places them at the center of our political life, it embeds them in our cultural imagination. They're the iconic family with whom we are all called to feel kinship: two accomplished parents, adorable children, a doting grandmother, and—since moving into the most fabled home in the land—a dog. They're like the Huxtables—only real, and better.<sup>63</sup>

Specifically, President Obama, a brilliant black husband, overtly and extraordinarily devoted to Michelle Obama, his fiercely capable stay-at-home (that is, now that home is the White House) black wife, created exquisite black children in whom they have instilled and deposited the secrets of ancestral strength. The omnipresent First Nana, Marian Robinson, and in absentia, her late husband and patriarch of their marital home, Fraser Robinson, III, anchor the Obama legacy as

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three hundred years had symbolized degradation and stigma—and turn it into an assertion of a group's humanity and solidarity." *Id.* at 1083.

60. See Brown & Leiby, *supra* note 13, at C01 (noting how First Lady Michelle Obama's family represents a number of black women). "They saw their family in hers, or the family they dreamed of having . . . [They saw] a woman whose husband seemed to adore her, giving her hugs and pecks on the lips as if the whole world were not watching." *Id.*

61. One black woman writer gushes in her book's Prologue:

Dear Mrs. Obama:

Do you have any idea what you mean to us? By us I mean the strong, independent, accomplished black women of America . . .

Most important (and this is a big one), you show us how you *truly love your man* and you let him love and take care of you. You honor the passion and sanctity of your marriage by making time for date nights out, nuzzling in public . . . and private weekends away with the commander-in-chief. You support him too; you are his total and complete helpmate.

SOPHIA NELSON, *BLACK WOMAN REDEFINED: DISPELLING MYTHS AND DISCOVERING FULFILLMENT IN THE AGE OF MICHELLE OBAMA* 1-3 (Erin Kelley ed., 2011).

62. See Brown & Leiby, *supra* note 13, at C01 (noting that black women see something else in First Lady Michelle Obama). Young women see "bits and pieces of themselves," as well as seeing "their family in hers, or the family they dreamed of having." *Id.*

63. BANKS, *supra* note 17, at 2.

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they ascend into history.<sup>64</sup> How could black Jonesers not vote for that? The Obamas are “like the Huxtables—only real, and better.”<sup>65</sup>

However, desegregation’s promises may have meant too much to Jonesers’ parents, as they had not worked out the potential blow-back<sup>66</sup> or contraindications of desegregation and what it could augur for their progeny. “[O]ne train may hide another.”<sup>67</sup> There was a hemorrhaging erosion.<sup>68</sup> Suddenly, their black sons were dating non-black women, deeming Joneser daughters not only insufficient by potential suitors<sup>69</sup>—but detrimental.<sup>70</sup> Men demonstrated their manhood for other men’s approval and “[t]he model for the hegemonic

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64. See Coates, *supra* note 48; see also NELSON, *supra* note 61.

65. BANKS, *supra* note 17, at 2.

66. See HOOKS, SALVATION, *supra* note 2, at 135 (“Our father and the black men of his generation always knew white supremacy was the problem, not black women. When the younger generation of black males could not blame everything on white racism, they targeted black women.”).

67. David A. Sklansky, “One Train May Hide Another”: Katz, Stonewall, and the Secret Subtext of Criminal Procedure, 41 U.C. DAVIS L. REV. 875, 877 (2008) (quoting Kenneth Koch, *One Train May Hide Another*, in ONE TRAIN 3-4 (1994)).

68. “When militant black male leaders dominating the anti-racist movement made freedom synonymous with the subordination of black women, their uncritical embrace of the notion that black men had been symbolically castrated was not challenged by men.” HOOKS, SALVATION, *supra* note 2, at 163.

69. When compared to black women, black men are twice and thrice more likely to marry someone of a different race. “Estimates are that more than one out of five black men marry interracial, whereas fewer than one out of ten black women do.” BANKS, *supra* note 17, at 33 (citation omitted). Melissa Harris-Perry notes that sexism within black communities exists:

The belief that black women make inadequately submissive wives is not the exclusive creation of white prejudice. African Americans embraced the image of the strong black woman, and this image figures prominently in the idea of black women as over-powering. For example, during the 2008 campaign, African American comedian Chris Rock added a new joke to his routine. Its premise is that African American women are dominating shrews unable to allow their husbands to lead in the domestic sphere. His humor assumes both that men are the rightful leaders of the home and that black women’s inability to submit to this leadership is pathological.

HARRIS-PERRY, *supra* note 22, at 287. Ralph Richard Banks goes further, stating that black men “can maintain absurdly high standards because they are under no pressure to commit—the options are endless.” BANKS, *supra* note 17, at 55.

70. See HARRIS-PERRY, *supra* note 22, at 290-92 (noting that in an ill-advised publicly televised discourse on “Why Can’t a Successful Black Woman Find a Man?,” the three black male participants had written books on black male-female romantic relationships that “frame the issue as a black female problem rather than a community issue”). She additionally notes that:

Each of these male participants was allowed to pontificate about how black women should behave without being challenged on his own relationship history and status. None of them can boast a lifetime marriage to one black woman. This personal information is relevant because personal narrative was the sole basis of the conversation. The [black] women participating in the panel were subjected to public scrutiny of their supposed shortcomings, while the men’s biographies were shielded by the assumption that their [black] maleness alone made them worthy.

*Id.* at 292.

masculinity that men are trying to demonstrate is the masculinity of powerful white men.”<sup>71</sup> Guess who’s *not* coming to dinner?<sup>72</sup>

Still, “Jonesers embraced the 1960s’ idealism and beatified its heroes.”<sup>73</sup> Such is not merely the stuff of anachronistic race-based “romantic segregation” aspiration<sup>74</sup> or other sorts of doomed insularity.<sup>75</sup> For example, it is not that households of single Joneser women were looking for Michelle’s husband or living an imaginary marriage through hers. Nor were black male votes cast and donations given for Obama simply because he and his wife were a racial “match.”<sup>76</sup> Rather, President and Mrs. Obama’s marriage is the brightest example of the limitless potential of the nostalgic “strong black family” and vaunted “Black Love.”<sup>77</sup> It is a powerful swan song for our deflated

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71. Frank Rudy Cooper, “Who’s the Man?”: *Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 689 (2009). Frank Rudy Cooper notes that in a hegemonic society, men compete with other men to prove to each man, “Who’s the man?” See *id.* at 688. For men, then, keeping up with the Joneses may seem “to be about impressing women, it is actually about impressing other men.” *Id.* at 688. Per Cooper, such a truth evidences the “homosocial aspect of masculinity,” as it is constructed and determined “in interactions between men.” *Id.* at 688.

72. This is an inverted reference to the 1967 movie, “Guess Who’s Coming to Dinner?” In the movie, Sidney Poitier portrayed the highly-regarded, internationally-renown Dr. Prentice, whose young and affluent white fiancé brings him home to meet her confused and initially dismayed parents. See, e.g., Roger Ebert Review: “Guess Who’s Coming to Dinner?,” CHICAGO SUN TIMES (Jan. 25, 1968), <http://rogerebert.suntimes.com/apps/pbcs.dll/article?AID=/19680125/REVIEWS/801250301> (critiquing, yet, praising the movie’s treatment of interracial nuptials and generational attitudes). A lesser referenced, but equally important part of the movie evidences Dr. Prentice introducing his fiancé to his parents who are less than enthusiastic about his choice of a future wife. *Id.* The parental reactions evidence a generational shift in what constitutes a desirable family, not only for whites, but also for AfricanAmerican parents and their children. See *id.* “At all other moments in our history black males and females had recognized that we were in the struggle together. It was assumed that part of what freedom would ultimately bring was a lifestyle where all black men could be patriarchs and keep their women subordinate.” HOOKS, SALVATION, *supra* note 2, at 135.

73. Kelley, *supra* note 46. Shelton Jackson “Spike” Lee, born in 1957, creates films, that are beautifully nuanced stories of the Boomer generation’s heroes and their struggle for equality. Two examples of his films include MALCOLM X (Largo International N.V. 1992) and THE MIRACLE AT ST. ANNA (40 Acres and a Mule Filmworks 2008).

74. Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1468 (2009) (dispelling perceived myths of closeted gay black men who marry or date heterosexual women). “An important backdrop for many of these articles is the frustrated heteronormative aspirations of many single black women, who are depicted as doing everything right and yet being denied the black husbands to which they are entitled.” *Id.* at 1474.

75. Cf. Nitsche & Brueckner, *supra* note 19, at 2 (“There seem to be strong barriers for interracial marriages between whites and blacks among the highly educated in general, and between white males and black females in particular. Our results confirm that ‘race trumps education.’”).

76. See, e.g., NELSON, *supra* note 61, at 7 (noting that three out of four black men surveyed appreciate Michelle Obama for reconstructing a positive image of black women).

77. Cf. Alexander, *supra* note 18 (demonstrating how the Obama’s are an “archetypical” example of black love).

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desire—steeped in all that was good during the waning days of the American Civil Rights and Black Power movements, which “remade the notion of American racial identity”<sup>78</sup>—to believe that we, as a people, loving ourselves and each other, shall reach The Promised Land.<sup>79</sup>

Heretofore, black Jonesers were steeped in the notion that “loving blackness as political resistance transforms our ways of looking and being, and thus creates the conditions necessary for us to move against the forces of domination and death and reclaim black life.”<sup>80</sup> For Jonesers, the Obama marriage and family represents community, family, mama, and daddy:<sup>81</sup> home.<sup>82</sup> When Barack Obama gave his victory speech on November 4, 2008, buoyed by the sea of black women he was lifting with his ascension, including Michelle, Sasha, Malia, and mother-in-law, Marian Robinson, the tectonic moment “served as a visual reminder that the election of Barack Obama had become a defining moment in black women’s struggle for recognition.”<sup>83</sup> Instead of growing weaker by choosing smart, schooled, independent, and strong Michelle LaVaughn Robinson as his wife, Barack Obama—much like many black Jonesers’ fathers—consolidated his power. He leaned on his rock; a woman strong enough to tell him not to “screw it up” when he is about to deliver the most important speech in his life up to that point.<sup>84</sup> He held tight to the mother-in-law whose

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78. NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* 377 (2010) (recounting the ways in which the Black Power Movement upended the media’s narrative of white supremacy, and temporarily caused black racial identity to become “the most fascinating”).

79. See NELSON, *supra* note 61, at 10.

80. HOOKS, *SALVATION*, *supra* note \*\*, at 66.

81. See Coates, *supra* note 48 (characterizing the Obamas as not unusual, but normal). The First Nana, Mrs. Robinson, finds her daughter and son-in-law normal: “[a]ll my relatives, all my friends, all their friends, all their parents, almost all of them have the same story. It’s just that their families [didn’t run] for president . . . there’s so much of that in the black neighborhood.” *Id.*

82. Black is also a yearning for home. Most Black people of the African Diaspora do not know where our home is, where we came from (besides somewhere on a vast and diverse continent), and who our people are. For Black people, identifying according to race is part of a yearning for home; it is a search for community, fellowship, and safety. e. christie cunningham, *Exit Strategy for the Race Paradigm*, 50 *How. L.J.* 755, 806 (2007).

83. HARRIS-PERRY, *supra* note 22, at 270.

84. BARACK OBAMA, *THE AUDACITY OF HOPE: THOUGHTS ON RECLAIMING THE AMERICAN DREAM* 359 (2006) (explaining that his confessed nervousness prior to his speech at the 2004 Democratic National Convention received a, “Just don’t screw it up, buddy!” from Michelle Obama); see also HARRIS-PERRY, *supra* note 22, at 285 (recounting the “gentle teasing” by a wife of her nervous husband). Quinetta Roberson, Villanova University professor points out that:

One of the other perceptions around [the First Lady] is that she is a very strong woman, and her influence on her husband and family is very clear . . . . In his acceptance speech, Barack Obama said she is ‘the rock of our family.’ Other politicians may say my spouse

face bore the weight of her family's historic catapult. He raised daughters, who are clearly being reared in the finest tradition of the strong and outspoken black American woman, and who warned him the night before his inaugural speech, "First African-American President? Better be good!"<sup>85</sup>

However, Jonesers are nothing else if we are not also practical. We are quite aware that simply because the United States has successfully installed a loving and powerful black couple in the White House does not mean that the current crop of heterosexual Generation Jones or younger black men will, henceforth, select only black American women to be their lawful wedded wives.<sup>86</sup> Nor does this mean that heterosexual Generation Jones black women and their more youthful sisters would accept marriage proposals from Joneser men or other black men.<sup>87</sup> The Black Power and Black is Beautiful movements disappointed,<sup>88</sup> as have other similar attempts to replenish Black America's stolen history, mythical unity, and collective selves.<sup>89</sup> Now,

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is my ally or inspiration, but it doesn't necessarily suggest an equal role. 'Rock of our family' means she is right next to him and a critical part of his foundation.

Brown & Leiby, *supra* note 13.

85. Mary Ann Akers, *Malia Obama to Dad: Speech "Better Be Good,"* WASH. POST (Jan. 15, 2009; 6:10 PM), [http://voices.washingtonpost.com/sleuth/2009/01/obama\\_to\\_inaugural\\_finance\\_tea.html](http://voices.washingtonpost.com/sleuth/2009/01/obama_to_inaugural_finance_tea.html).

86. In other words, these men do not conflate the "undeniable accomplishment" of the Obamas' marriage with their personal politics and mating or marriage "preferences." They may express a positive (or no) opinion that Barack found his Michelle; however, they feel no need to pretend or decide that they seek the same. Cf. Kimberle Williams Crenshaw, *Twenty Years of Critical Race Theory: Looking Back to Move Forward*, 43 CONN. L. REV. 1253, 1312 (2011) (warning against conflating Barack Obama's presidential victory with the achievement of racial justice and post-racialism in America).

87. "However remarkable this particular accomplishment has been, it serves as meager evidence that the socio-political terrain is itself colorblind." *Id.* at 1319.

88. "Our love for black people was overwhelmed by our inability to do everything to make that love manifest, and after a while we could not even love each other." HOOKS, *SALVATION*, *supra* note \*\*, at 16 (quoting black male author Julius Lester).

89. e. cunningham opines:

At various times and in a variety of ways during our past, we have tried to return to that place or to manufacture it—the Garveyites, the Republic of New Africa. Home is also kin and clan. Home is our family and traditions, our rituals and God. At various times and in a variety of ways during our past, we have tried to re-connect with our people and re-collect our culture—genetic ancestral tracing, name changes to African names, African attire, and spiritual practices. Home is also a time. Home is the time before catastrophe, before the middle passage, the time before the break, the disconnection and dismemberment. When the place called home has changed or been destroyed, when home, the people, have moved or advanced through generations, and when home, the time, has passed, then what do we have to fill the void? We have made Black into our home away from home, a place where we stay while we yearn for what has been stolen from us.

*supra* note 82, at 806-07.

*The “First Family Effect:” “Love on Top”*

all the men are black and all the women are white.<sup>90</sup> Though black men and black women still, overwhelmingly, marry each other, Jonesers are quite aware that such conduct is less about the cumulative effect of a lofty, principled decision to uplift the race, than about the less glorious rationales of proximity, familiarity, facility, and expediency.<sup>91</sup> Jonesers have adapted.<sup>92</sup> For us, “the seemingly black and white world of [the Boomers has] devolved to varying shades of grey.”<sup>93</sup>

Thus, family life is no longer idealized as the panacea it once represented; marriage is no longer regarded as the most desirable personal choice for heterosexual couples. In addition, inter-racial, rather than intra-racial pairings, are on the rise (all of which, ostensibly, deal the concepts of black unity, power, and love a multiplicity of death blows).<sup>94</sup> The Obama family’s embodiment and exudation of an impenetrably strong marriage filled with adoration and respect empowers those Jonesers who still yearn to see “black folks who ‘love blackness,’ that is, who have decolonized [their] minds and broken

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90. See Haya El Nasser & Paul Overburg, *How America Changed*, USA TODAY (Aug. 9, 2011, 11:10 PM), [http://www.usatoday.com/NEWS/usaedition/2011-08-10-1Acensusturningpoints-CV\\_CV\\_U.htm](http://www.usatoday.com/NEWS/usaedition/2011-08-10-1Acensusturningpoints-CV_CV_U.htm) (“The black-white racial dynamics that have dominated much of the nation’s history have been scrambled by the explosive growth of Hispanics.”). See generally ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE (Gloria T. Hull et al. eds., 1982) (providing the first black women’s study text that discusses how black women are typically ignored, as well as the nullification of the effects of race and gender upon their lives). This text discusses how in race and gender studies, as well as throughout feminist or anti-racist policies, black women are typically ignored, given the intersection and, to most minds, nullification of the effects of race and gender upon their lives when, in fact, their disfavored status and, therefore, subordination experiences are exacerbated. *Id.*

91. See, e.g., Nitsche & Brueckner, *supra* note 19 (“[Highly educated b]lack women are increasingly less likely to marry and have children; if they marry, they are more likely than any other group to marry lesser-educated men; and if they have children, they are more likely to do so while still in training, with potential consequences for educational attainment and career formation.”).

92. See, e.g., Coates, *supra* note 48 (finding that an increasing number of blacks are taking a “third road,” i.e., instead of distinguishing their identity as black or “masking” it while in the presence of non-blacks, more are treating their identity “as a branch of the American tree” rather than a “separate trunk”).

93. See Kelley, *supra* note 46 (“Jonesers embraced the 1960s’ idealism and beatified its heroes but for them the seemingly black and white world of that era devolved to varying shades of grey.”).

94. Though Michelle Obama represents “an archetypal African-American female success story . . . [having a] law career, strong marriage, [and] happy children . . . the reality is often very different for other highly educated black women.” Alexander, *supra* note 18. Instead of the highly educated “Baracks” marrying their “Michelles,” “[r]acial marital homogamy [has] declined for black males with postgraduate education[.]” Nitsche & Brueckner, *supra* note 19, at 2. “In 2000-07, 4.5% of black women and 14% of black men were in interracial marriages.” *Id.*

with the kind of white supremacist thinking that suggests we are inferior, inadequate, marked by victimization, etc.”<sup>95</sup>

These black Jonesers understand and respect those who seem to hold fast to, or at least model, the family values we still hold dear.<sup>96</sup> We also seek reconciliation with reality.<sup>97</sup> If wedded bliss is no longer ours to enjoy, we shall joyfully shout “huzzah,” whisper “Ashe,”<sup>98</sup> and murmur “Umoja”<sup>99</sup> in celebration of it as well as our fictive kin.<sup>100</sup> For the last fifty years, “African Americans have become the most unmarried people in our nation. By far. We are the least likely to marry and the most likely to divorce; we maintain fewer committed and enduring relationships than any other group.”<sup>101</sup> Yet, the Obamas live.

W.E.B. Du Bois described the psychic burden of black Americans’ race-based existence in the United States as “double consciousness.”<sup>102</sup> Gayle Pemberton, however, was later compelled to describe

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95. BELL HOOKS, *BLACK LOOKS: RACE AND REPRESENTATION* 17 (1992).

96. See *The Decline of Marriage and Rise of New Families*, PEW RESEARCH CTR., 25 (Nov. 18, 2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> (noting that 44% of blacks agree that “marriage is becoming obsolete, [which] could well be shaped . . . by their life experiences”).

97. Fewer than 33% of black adults are married, compared with half of Hispanics and 56% of white adults. See *id.* at 9, 29. Additionally, 44% of adult blacks have never been married along with around 23% of white adults. *Id.* Compare this census data with 1960, where 17% of adult blacks and 14% of adult whites were never married. *Id.*

98. “Ashe” is a West African, Yoruban, word that translates as “so be it” and has been described as an expression of “an all-pervasive spiritual energy” that is understood to “animate[] all of creation; it comes from the source of creation,” and is comparable to “Amen.” See Will Coleman, “Amen” and “Ashe”: *African American Protestant Worship and Its West African Ancestor*, BUSINESS LIBRARY, [http://findarticles.com/p/articles/mi\\_m2096/is\\_2\\_52/ai\\_92285031/](http://findarticles.com/p/articles/mi_m2096/is_2_52/ai_92285031/) (last visited Nov. 6, 2011).

99. “Umoja” is a Kiswahili term that means “unity.” *Word of the Week: Umoja*, DIALECT (Mar. 22, 2010, 1:00 AM), <http://thedialect.wordpress.com/2010/03/22/word-of-the-week-umoja/>.

100. HARRIS-PERRY, *supra* note 22, at 102 (“[F]ictive kinship refers to connections between members of a group who are unrelated by blood or marriage but who nonetheless share reciprocal social or economic relationships.”).

101. BANKS, *supra* note 17, at 2.

102. Per Du Bois:

[T]he Negro is a sort of seventh son, born with a veil, and gifted with second sight in this American world—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double-consciousness, this sense of always looking at one’s self through the eyes of others, of measuring one’s soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.

This history of the American Negro is the history of this strife—this longing to attain self-conscious manhood, to merge his double self into a better and truer self. In this merging he wishes neither of the older selves to be lost. He would not Africanize America, for America has too much to teach the world and Africa. He would not bleach his Negro soul in a flood of white Americanism, for he knows that Negro blood has a message for the world. He simply wishes to make it possible for a man to be both



*The “First Family Effect:” “Love on Top”*

the psychic freedom of authentic living by black Americans as “triple consciousness”<sup>103</sup>:

As Du Bois describes double-consciousness there is too much room for [B]lacks to sentimentalize their own condition; there can be no movement toward real freedom because they are incapable of changing the ways in which they are seen. Triple-consciousness goes one step further: how one is seen is a given, with variations on the modifiers of both contempt and pity. How one performs the act, in all cognizance of the outside world, becomes a supreme act of individuation that can go beyond Du Bois’s ‘longing’ to the attainment of ‘true self-consciousness,’ of ‘merging [the] double self into a better and truer self.’<sup>104</sup>

Moreover,

Given the politics of black life in this white supremacist society it makes sense that internalized racism and self-hate stand in the way of love. Systems of domination exploit folks best when they deprive us of our capacity to experience our own agency and alter our ability to care and to love ourselves and others.<sup>105</sup>

Because redemption may be all in the performance—the performer “knowing something, feeling something quite different from what a[n] audience saw, and also communicating something else, some quality of solidarity and kinship,”<sup>106</sup>—choosing black-on-black love “has always been a gesture of resistance for African Americans.”<sup>107</sup>

President Obama’s statements and demonstrations regarding the unabashed love for his wife, her intelligence, and her competency are “quite . . . public and political statement[s].”<sup>108</sup> First Lady Michelle Obama’s unwavering adoration and formidable support of her strong

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a Negro and an American, without being cursed and spit upon by his fellows, without having the doors of opportunity closed roughly in his face.

W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 5 (1994).

103. See GAYLE PEMBERTON, *THE HOTTEST WATER IN CHICAGO: NOTES OF A NATIVE DAUGHTER* 231 (1992). Gayle Pemberton, in the essay entitled, “O Porgy! O Bess!,” wrote of how she was finally able to extract redemptive meaning from public performances of negative stereotypes that might otherwise claim psychic injury via misrepresentation: triple-consciousness. *Id.*

104. *Id.*

105. *Id.* at 18.

106. *Id.* at 223.

107. BELL HOOKS, *ROCK MY SOUL: BLACK PEOPLE AND SELF-ESTEEM* 19 (2003).

108. Brown & Leiby, *supra* note 13 (quoting Lani Guinier, Harvard University Law professor). Another law professor, Alice Thomas, of Howard University School of Law, put it this way: “[h]e had a humble enough spirit to concede the stage to her . . . . It elevated black women in a way we haven’t been elevated since antiquity: Queen Hatshepsut, Queen Nzinga, Cleopatra, Nefertiti.” *Id.*

husband are compelling and exemplary.<sup>109</sup> As such, we love the Obama family.<sup>110</sup> Finally, they put our love “on top.”<sup>111</sup>

Long live President Barack and First Lady Michelle Obama.  
Long live the Obamas.  
Long live Black Unity.  
Long live Black Love.

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109. See NELSON, *supra* note 61, at 3.

110. See *id.* at 1-8.

111. This sentence paraphrases the eponymous lyric in which Beyoncé triumphantly and repeatedly proclaims, “Finally, you put my love on top.” See Beyoncé Knowles, “*Love On Top*” Lyrics, METRO LYRICS, <http://www.metrolyrics.com/love-on-top-lyrics-beyonce-knowles.html> (last visited Nov. 12, 2011).

# The Impact of Recessionary Politics on Latino-American and Immigrant Families: SCHIP Success and DREAM Act Failure

MARIELA OLIVARES\*

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## INTRODUCTION

The current financial crisis touches Americans of all backgrounds and income levels.<sup>1</sup> As lawmakers attempt to stretch tight budgets

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1. See Danné L. Johnson, *Untwisting Lifeline Nonprofits in the Economic Crisis*, 18 *GEO. J. ON POVERTY L. & POL'Y* 201, 217 (2011) (“We are currently in the midst of the worst recession since the Great Depression. A host of measures can be examined to compare the duration and severity of the most recent recession to previous recessions since WWII. As a rule of thumb, a recession is defined by two successive quarters with a decline in Gross Domestic Product (GDP). The National Bureau of Economic Research (NBER) is the recognized authority for dating U.S. recessions. The NBER defines an economic recession as a ‘significant decline in [the] economic activity spread across the country, lasting more than a few months, normally visible in real GDP

through policy choices, families already living on the margins of poverty are often profoundly affected.<sup>2</sup> Not surprisingly, in times of deep financial distress, those American families that struggle to make ends meet (even in good times) take a hard hit.<sup>3</sup> Moreover, many poor and modest-income families living in the United States are people of color, particularly blacks and Latino-Americans.<sup>4</sup> Indeed, people of color

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growth, real personal income, employment (non-farm payrolls), industrial production, and wholesale-retail sales.’ The average length of a recession is 11.6 months and this recession has surpassed this average by seven months. According to the NBER, the most recent recession began on December 2007 and officially ended in June 2009.”) (citations omitted); Ylan Q. Miu, *Fed Survey Shows How Recession Affected Wealth*, WASH. POST, Mar. 24, 2011, at A19 (“The Great Recession shook households of every income, with a median 45 percent decline in wealth for the majority of consumers surveyed in a Federal Reserve study . . . . The survey followed families from 2007 to 2009 as the financial crisis roiled the nation, offering what Fed officials said was the first detailed analysis of the finances of individual households through the recession. It found that nearly 63 percent of families surveyed suffered a drop in net worth.”).

2. See Stuart P. Green, *Hard Times, Hard Time: Retributive Justice for Unjustly Disadvantaged Offenders*, 2010 U. CHI. LEGAL F. 43, 44-46 (“Household income in the US among all groups declined during 2008, but more sharply for the poor than for the wealthy and middle class. According to Census Bureau statistics, there were 39.8 million people living in poverty in the United States during 2008, up from 37.3 million the year before. This represents a poverty rate of 13.2 percent in 2008, up from 12.5 percent in 2007 and the highest rate since 1997. The number of families living in poverty also increased in 2008, to 8.1 million from 7.6 million in 2007, as did the percentage of families living in poverty, to 10.3 percent from 9.8 percent the year before. In addition, according to US Department of Agriculture figures, the number of Americans who lived in households that lacked consistent access to adequate food during 2008 was at the highest level since the government began tracking what it calls ‘food insecurity’ in 1995. And poverty and food insecurity rates were expected to be even higher in 2009 as a result of the far higher rate of unemployment than in 2008.”) (citations omitted).

3. See *id.*; Trina Jones, *Race, Economic Class, and Employment Opportunity*, 72 LAW & CONTEMP. PROBS. 57, 58 n.14 (2009) (“Poor people, people of color, and young workers are often the hardest hit during economic slowdowns.”) (citation omitted).

4. See Jones, *supra* note 3, at 57-58 (“In the United States, income distribution is highly concentrated at the top, with the top 1% of the population earning more than 20% of all income and the top 10% earning almost half of all income . . . . The situation is worse for people of color. Despite measurable progress within some subgroups, people of color still tend to earn significantly less than their White counterparts; they tend to be segregated into lower-paying and lower-status occupations; they tend to be unemployed at a substantially higher rate than Whites; and they are twice as likely to be impoverished as Whites.”) (citations omitted). Moreover, Professor Mildred Wigfall Robinson notes how black and Latino workers experience joblessness more acutely than white people: “Although black women, like white women, have been disproportionately employed in health-care, education, and government sectors, they experienced greater rates of unemployment than both white women and white men. In May 2010, 12.4% were unemployed, up slightly from an unemployment rate of 11.3% in May 2009. Black women’s patterns of employment differ from those of white women in two important ways: black women have been relative newcomers in positions of this kind in many instances, and they have tended to hold less hierarchical positions. Both of these factors work against them in this tough economic environment. Unemployment rates for Hispanic/Latina women as of May 2010 are higher than that for white women but not as high as that for black women. Here also, patterns of employment roughly tracked those of white and black women.” Mildred Wigfall Robinson, *The Current Economic Situation and Its Impact on Gender, Race, and Class: The Legacy of Raced (and Gendered) Employment*, 14 J. GENDER RACE & JUST. 431, 436 (2011). “Black men have suffered unemployment at a rate exceeding that of Hispanic/Latino men and roughly twice that of white men—higher than that of any other demographic group.” *Id.* at 437 (citation omitted).

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have been disproportionately affected by the recession in the rates of unemployment and job losses.<sup>5</sup> A 2011 report by the PEW Hispanic Center gives the bleak picture. For the first time in United States history, there are more Latino<sup>6</sup> children living in poverty than children of any other racial or ethnic group.<sup>7</sup> Immigrants<sup>8</sup> in the United States,

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“[T]he unemployment rate for Hispanic men was 12.4%—higher than that of white men but significantly lower than that of black men. Like black men, Hispanic/Latinos have been heavily employed in the construction and manufacturing industries. Indeed, the collapse of the housing bubble has likely been the major factor contributing to male Hispanic/Latino unemployment.” *Id.* at 439 (citations omitted). This Article labels as “Latino-American” those people born in the United States—and thus United States Citizens—who are of Latino ethnic descent and who identify as ethnically Latino. The term “Latino” is an umbrella term used to describe those people whose ethnic background is from Spanish-speaking countries of North America, South America, Central America, the Caribbean and other disparate areas. Sharon R. Ennis et al., *The Hispanic Population: 2010*, 2010 CENSUS BRIEFS (U.S. Census Bureau, Washington, D.C.), May 2011, at 2, available at <http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf> (“Hispanic or Latino” refers to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race.”).

5. See, e.g., Jones, *supra* note 3, at 58 n.14; Lawrence Joseph, *Issues of Race in the Age of Obama*, 25 J. C.R. & ECON. DEV. 117, 122 (2010) (“During this Great Recession, [s]ome groups have felt more economic pain than others,” as ‘African-Americans and Hispanics have lost more economic ground and done so more quickly than their white counterparts, . . . and the economic fortunes of minorities have fallen from lower levels than those of whites to begin with.’ As a result, ‘the gap in the economic security between minorities and whites is widening in this recession, as it had in previous ones.’”) (citing Christian E. Weller, *Leveling the Playing Field: How to Ensure Minorities Share Equitably in the Economic Recovery and Beyond* 1 (2009), CENTER FOR AM. PROGRESS, Sep. 23, 2009, [http://www.americanprogress.org/issues/2009/09/minorities\\_report.html](http://www.americanprogress.org/issues/2009/09/minorities_report.html)); Robinson, *supra* note 4, at 432; see also Johnson, *supra* note 1, at 218 (“The current recession has been particularly hard for men and minorities.”). Moreover, families who were in the more comfortable middle class ten years ago in the time of economic progress are suffering the effects of the recession, including high rates of bankruptcy filing. See Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 WASH. & LEE L. REV. 1777, 1786 (2004) (“Hispanic families are nearly twice as likely to file for bankruptcy as their non-Hispanic white counterparts, and black families more than three times more likely to file than white families.”).

6. See MARK HUGO LOPEZ & GABRIEL VELASCO, PEW HISPANIC CTR., THE TOLL OF THE GREAT RECESSION: CHILDHOOD POVERTY AMONG HISPANICS SETS RECORD, LEADS NATION 4 (Paul Taylor ed., 2011), available at <http://pewhispanic.org/files/reports/147.pdf> (using “Hispanic” and “Latino” interchangeably and as encompassing those whom this Article refers to as Latino-American and immigrants of Latino descent).

7. *Id.* Importantly, the report distinguishes that “[e]ven though there are more Latino children in poverty than any other racial or ethnic group, the poverty rate among black children is the nation’s highest. In 2010, 39.1% of black children lived in poverty, while 35% of Latino children and 12.4% of white children lived in poverty.” *Id.* at 6. Still, the rate of children in poverty has increased the most for Latino children: “Between 2007 and 2010, the Latino child poverty rate increased 6.4 percentage points. Among black children over the same period, the poverty rate increased 4.6 percentage points. And among white children, the poverty rate increased 2.3 percentage points.” *Id.*

8. “The term ‘alien’ means any person not a citizen or national of the United States.” 8 U.S.C. § 1101(a)(3) (2006). In order to avoid the dehumanizing connotations of the term “alien,” this Article uses the term “immigrant” to describe any foreign-born person living in the United States whether in legal status or unlawfully present in the United States. The label “illegal alien” appears throughout this Article, though, to highlight the rhetorical power of the label in contemporary political and popular culture. For a more thorough description of the various

those with legal immigration status and those living without legal immigration status (undocumented immigrants<sup>9</sup>), have also borne the brunt of economic hardship.<sup>10</sup> The 2011 Pew Hispanic Center report noted that children of immigrant parents had substantially higher rates of poverty than children of Latino-American parents. Specifically, “[i]n 2010, the poverty rate among Latino children with immigrant parents was 40.2%, while it was 27.6% among Latino children with U.S.-born parents.”<sup>11</sup>

The United States government has responded with mixed success to meet the needs of poor and modest-income families in the economic downturn. As budgets were slashed,<sup>12</sup> the needs of the poor, particularly the voiceless poor, like immigrants,<sup>13</sup> were often ignored.<sup>14</sup> The effects are policies that put additional stress on Latino-

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types of immigrant classifications in the United States, see Mariela Olivares, *A Final Obstacle: Barriers to Divorce for Immigrant Victims of Domestic Violence in the United States*, 34 *HAMLIN L. REV.* 149, 162-65 (2011).

9. Undocumented immigrants are people who are not lawfully present in the United States. See Olivares, *supra* note 8, at 162 (“People who are not lawfully present in the United States generally enter the country in one of two ways. They may enter without inspection, which typically means crossing the U.S. border illegally, undetected by immigration authorities. They may also enter the United States lawfully—perhaps through a tourist, student, or work visa—but remain in the country past the expiration date of their visa. This second group of undocumented immigrants can be considered ‘out of status.’”).

10. See RAKESH KOCHHAR ET AL., PEW HISPANIC CTR., *AFTER THE GREAT RECESSION: FOREIGN BORN GAIN JOBS; NATIVE BORN LOSE JOBS 2* (Paul Taylor ed., 2010), available at <http://pewhispanic.org/files/reports/129.pdf> (“The 656,000 jobs immigrants gained in the first year of the recovery are not nearly sufficient to make up for the 1.1 million jobs they lost from the second quarter of 2008 to the second quarter of 2009. Over the two-year period from 2008 to 2010, second quarter to second quarter, foreign-born workers have lost 400,000 jobs and native-born workers have lost 5.7 million jobs. The unemployment rate for immigrants is still more than double the rate prior to the recession, when it stood at 4.0% in the second quarter of 2007. Also, even as immigrants managed to gain jobs in the recovery, they experienced a sharp decline in earnings. From 2009 to 2010, the median weekly earnings of foreign-born workers decreased 4.5%, compared with a loss of less than one percent for native-born workers.”) (citation omitted). This finding was especially acute for Latino workers. *Id.* (“Latino immigrants experienced the largest drop in wages of all.”) (citation omitted).

11. LOPEZ & VELASCO, *supra* note 6, at 9. This Article does not distinguish the experiences of Latino or Hispanic immigrants from the experiences of other immigrants. The 2011 Pew Hispanic Center report focuses on Latino or Hispanic immigrants and defines “[c]hildren of immigrant parents [as] includ[ing] foreign-born children and U.S.-born children born to at least one foreign-born parent. The children of U.S.-born parents are native-born children under age 18 who have two U.S.-born parents.” *Id.* fig.3 (quoting the note). Despite this difference, the Pew Hispanic Center report provides important information about the large Latino immigrant population in the United States and provides a context to understand the intersecting marginalizing burdens they face, as discussed in this Article. See also *infra* note 162.

12. See, e.g., Monica Davey, *Families Feel Sharp Edge of State Budget Cuts*, N.Y. TIMES, Sept. 6, 2011, at A22.

13. See, e.g., Olivares, *supra* note 8, at 190.

14. See *id.*; see, e.g., Nikita Stewart, *D.C. Budget Takes Major Cut for 2012*, WASH. POST, Apr. 3, 2011, at A01; Thelma Sardin, *Social Service Programs Fear Budget Cuts*, WKLY. CITIZEN

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American and immigrant families living in the United States. Economic hardships on all families—especially those already living on the edge of poverty—lead to homelessness, hunger, and other severe stressors on wage earners and their dependents.<sup>15</sup> On the other hand, the Obama administration has taken some measured steps to ease the burden of Latino-American and immigrant families.<sup>16</sup> Due to governmental support of certain programs, burdens on families have been marginally eased.

This Essay will examine two examples of government programs that have been targeted for legislative change during the current recession and comment on how such programs have affected the fabric of the Latino-American and immigrant family in the United States. First, Part I of this Essay will discuss the State Children's Health Insurance Program ("SCHIP")<sup>17</sup> and note how President Obama's 2009 reauthorization of the program thwarted the years-long efforts to diminish and extinguish this health insurance coverage program for children and their families. Importantly, Part I will also discuss SCHIP's road to legislative success in an era of broad anti-immigrant sentiment. Though the SCHIP 2009 reauthorization incorporates funding for some immigrants, debate about the measure did not focus on typical anti-immigrant rhetoric but rather embraced a message of helping children.

Second, this Essay will consider the failure in 2010 of the Development, Relief, and Education for Alien Minors ("DREAM") Act,<sup>18</sup> a law that would have provided a path to citizenship for young undocumented immigrants living in the United States who succeed academically and/or through service in the United States military.

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(Mar. 2, 2011), <http://www.thechicagocitizen.com/community-focus/social-service-programs-fear-budget-cuts/>.

15. See LOPEZ & VELASCO, *supra* note 6, at 5 ("[A]ccording to the U.S. Department of Agriculture, food insecurity among Latino households increased sharply at the start of the Great Recession. In 2008, nearly a third (32.1%) of Latino households with children faced food insecurity, up from 23.8% in 2007.") (citing MARK NORD ET AL., U.S. DEP'T OF AGRIC., ECON. RESEARCH REPORT NO. ERR-83, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES, 2008 (2009) (defining food insecure households as "those where food intake of one or more household members was reduced because of a lack of money or other resources")); Sabrina Tavernise, *Poverty Rate Soars to Highest Level Since 1993*, N.Y. TIMES, Sept. 14, 2011, A01; see also 60 Minutes: *Hard Times Generation: Homeless Kids* (CBS television broadcast Mar. 26, 2011), available at <http://www.cbsnews.com/video/watch/?id=7358670n>.

16. For example, President Obama supported and reauthorized health insurance for poor and modest-income children in 2009. See discussion *infra* Part I.B.

17. Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3, 123 Stat. 8.

18. H.R. 6497, 111th Cong. (2010); S. 3992, 111th Cong. (2010).

Through this discussion, Part II will provide a contrast about how this measure—also aimed at helping children—failed to garner necessary political support for its passage into law due to the rhetorical focus on the undocumented immigrant. Finally, this Essay comments on how this extinguished Dream affects Latino-American and immigrant families in the United States. This Essay further establishes the groundwork for a future article, which will more deeply explore the implementation challenges of the DREAM Act and provide analyses through a historical framework that ultimately advocates for the passage of the Act.

## I. SCHIP SURVIVES THE RECESSION

### A. Brief SCHIP Background and Gains in Health Care Statistics for Children of Color

For millions of American families, being able to afford adequate health care is a low priority when it comes to stretching tight budgets. Health insurance options were historically minimal for these families, especially those in which the wage earner(s) make enough income to be disqualified from entitlement health care programs that serve the very poor, but not enough to afford private insurance or whose employers do not offer subsidized insurance. However, with the creation and recent expansion of SCHIP,<sup>19</sup> a federal program now in its fifteenth year, health care is within reach to these families.

SCHIP provides matching federal dollars to states for health insurance to certain families with children.<sup>20</sup> SCHIP is administered by the United States Department of Health and Human Services<sup>21</sup> and is intended to provide health insurance for families with income that is modest but too high to qualify for Medicaid.<sup>22</sup>

Created in 1997 under President Bill Clinton as part of the Balanced Budget Act of 1997,<sup>23</sup> SCHIP is one of the largest taxpayer-

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19. See Children's Health Insurance Program Reauthorization Act of 2009.

20. Janet L. Dolgin, *Class Competition and American Health Care: Debating the State Children's Health Insurance Program*, 70 LA. L. REV. 683, 700-02 (2010).

21. *Id.*

22. H.R. REP. NO. 105-217, at 758 (1997) (Conf. Rep.), 1997 WL 424974; see also Dolgin, *supra* note 20, at 702 ("As originally designed, SCHIP was to be available to children whose parents earned too much to be eligible for Medicaid but not more than or, depending on the state, not much more than 200% of the federal poverty level (FPL). For 2008, the FPL was set at \$10,400 for one person and at \$21,200 for a family of four. Federal law gave states the option of covering children at higher income levels.") (citations omitted).

23. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4901, 111 Stat. 251.



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funded health insurance programs<sup>24</sup> since the creation of the Medicaid program in 1965.<sup>25</sup> SCHIP was established as part of the Social Security Act<sup>26</sup> in 1997 with a block grant of about \$40 billion in federal money allocated for ten years (1998 through 2007).<sup>27</sup> Generally, as a block grant, SCHIP provides states with matching federal money<sup>28</sup> and gives a certain degree of flexibility to the states in determining participant payouts and eligibility requirements.<sup>29</sup> Unlike entitlement programs that provide the eligible individuals with an entitlement to a health care program,<sup>30</sup> i.e., Medicaid and Medicare, block grant programs like SCHIP allow states broad discretion to set up eligibility for enrollment and provision of benefits.<sup>31</sup> As a result, children who might qualify under one state's guidelines may not qualify in their home state for SCHIP coverage. As Professor Janet L. Dolgin explained, "If a state offers SCHIP as a discretionary benefit, then the state can limit costs by capping SCHIP enrollment . . . . In sum, even children who meet SCHIP's eligibility requirements are not guaranteed continuing coverage."<sup>32</sup>

Despite its shortfalls, SCHIP changed the face of health insurance for families with modest incomes, including Latino-American and immigrant families. SCHIP provides health insurance coverage

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24. SCHIP FAQ, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=14045> (last visited Oct. 16, 2011).

25. Social Security Amendments of 1965, Pub. L. No. 89-97, § 121, 79 Stat. 286.

26. H.R. Rep. No. 105-217, at 756.

27. *Id.*

28. See CONG. BUDGET OFFICE, CONG. OF THE UNITED STATES, A CBO PAPER: THE STATE CHILDREN'S HEALTH INSURANCE PROGRAM, at vii (2007), available at <http://www.cbo.gov/ftpdocs/80xx/doc8092/05-10-SCHIP.pdf> [hereinafter, A CBO PAPER].

29. See *id.* ("States have considerable flexibility in designing their eligibility requirements and policies for SCHIP. In 2006, 26 states set their eligibility thresholds at 200 percent of the federal poverty level, 15 states had thresholds above 200 percent of the poverty level, and 9 had thresholds below. (The federal poverty level for a family of three in 2007 is \$17,170.) The lowest eligibility threshold in a state was 140 percent of the poverty level and the highest was 350 percent. Most states subtract a portion of the family's earnings and certain expenses to compute a measure of net income that is used to determine a child's eligibility for SCHIP. States can provide SCHIP coverage by expanding Medicaid to children not eligible for that program, creating a separate program under SCHIP, or using a combination of the two approaches.") (citations omitted).

30. See Dolgin, *supra* note 20, at 700-01 ("Unlike Medicaid, however, SCHIP does not provide individual entitlements; rather, it provides block grants to the states. In effect, it provides states, not individuals, with capped entitlements. The difference is an important one. Programs that provide entitlements create legal rights. Medicaid and Medicare extend entitlements to both states and eligible individuals. That is, individuals deemed eligible for Medicaid have a right, pursuant to the authorizing legislation, to participate in the program. The same is not typically the case for those deemed eligible for SCHIP programs.")

31. See A CBO PAPER, *supra* note 28, at vii; Dolgin, *supra* note 20, at 701-02.

32. Dolgin, *supra* note 20, at 702.

for approximately six million children during the course of a year and covers approximately four million children at any one time.<sup>33</sup> From 1997 to 2007, the benefits of SCHIP were stark: first, in insuring previously uninsured children; and, second, in improving measures of health care provisions to children of color and their utilization of health care.

First, SCHIP has achieved its goal in insuring previously uninsured children. In a 2005 broad evaluative study of ten states' SCHIP programs, researchers learned that SCHIP is serving the target population of children who would have been uninsured without the program.<sup>34</sup> The study found that forty-three percent of the enrolled study respondents had been uninsured for at least six months before they enrolled in SCHIP, and an additional fourteen percent had been covered by private employer-provided coverage but lost that coverage involuntarily during the six-month period prior to enrollment.<sup>35</sup> As the Congressional Budget Office ("CBO") noted in its 2007 report on SCHIP: "SCHIP has significantly reduced the number of low income children who are uninsured . . . . [A]mong children living in families with income between 100 percent and 200 percent of the poverty level (the group with the greatest increase in eligibility for public coverage under SCHIP), the uninsurance rate fell from 22.5 percent in 1996 (the year before SCHIP was enacted) to 16.9 percent in 2005, a reduction of 25 percent."<sup>36</sup>

Second, SCHIP has been an essential program in providing health care to children of color. In the same 2005 study, researchers found that children who enrolled in SCHIP in the ten studied states

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33. See KAISER COMM'N ON MEDICAID AND THE UNINSURED, THE HENRY J. KAISER FAMILY FOUND., STATE CHILDREN'S HEALTH INSURANCE PROGRAM (SCHIP) AT A GLANCE (2007), available at <http://www.kff.org/medicaid/upload/7610.pdf>.

34. See JUDITH WOOLDRIDGE ET AL., MATHEMATICA POLICY RESEARCH, INC. ET AL., CONGRESSIONALLY MANDATED EVALUATION OF THE STATE CHILDREN'S HEALTH INSURANCE PROGRAM: FINAL REPORT TO CONGRESS, at xv (2005), available at <http://www.mathematica-mpr.com/publications/pdfs/schipcongress.pdf> (evaluating SCHIP programs in California, Colorado, Florida, Illinois, Louisiana, Missouri, New Jersey, New York, North Carolina, and Texas).

35. See *id.* at 60.

36. A CBO PAPER, *supra* note 28, at viii. A CBO Paper notes, however that "the increase [in previously uninsured children now insured under SCHIP] has not been one for one with the number of children enrolled in public coverage [i.e. SCHIP] as a result of [SCHIP]. SCHIP provides an alternative source of coverage that is less expensive to enrollees and often provides a broader range of benefits than private coverage; as a result, the program 'crowds out' private coverage to some extent. Estimates of the extent to which private coverage has declined in response to the program vary; the available evidence, however, strongly suggests the net effect of the program has been to reduce the number of uninsured children." *Id.* at 7.

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came from “diverse racial and ethnic backgrounds.”<sup>37</sup> Almost one-half of the children enrolled in SCHIP in these states were Hispanic;<sup>38</sup> one-third of the children were white and English-speaking; twelve percent were black; and six percent were Asian.<sup>39</sup> Moreover, approximately one-third of the enrolled children “lived in households in which English [was] not the primary language,”<sup>40</sup> which suggests that SCHIP was reaching families where at least some members were foreign-born.<sup>41</sup>

Further, SCHIP has diminished ethnic and racial disparities in children’s access to and regular use of health care.<sup>42</sup> In one large-scale study of the New York SCHIP model, for example, researchers reviewed whether inequities in access to health care for children as measured by their race and/or ethnicity diminished since SCHIP began.<sup>43</sup> The research showed that “(1) substantial racial/ethnic disparities [in medical care access, continuity, and quality] existed before enrollment [in SCHIP], (2) outcomes for children of all races improved during SCHIP, and (3) preexisting racial/ethnic disparities in access, unmet need, and continuity were virtually eliminated during SCHIP.”<sup>44</sup> Further noting that other sociodemographic and health system factors did not influence the research findings, the researchers concluded that “SCHIP improves care for vulnerable children and reduces preexisting racial/ethnic disparities in health care.”<sup>45</sup> Thus, in this case and as

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37. See WOOLDRIDGE ET AL., *supra* note 34, at xiv. The researchers in this Congressionally-mandated study acknowledged that the Hispanic enrollment numbers of the children in the study were also high because the Hispanic populations in some of the studied states are large. *See id.* at 23 (“The high proportion of Hispanic children at least partly reflects the inclusion in this sample of the six states with the largest Hispanic populations (California, Texas, New York, Florida, Illinois, and New Jersey).”) (citation omitted). Still, the broad range of the studied states’ demographics generally result in an accurate portrayal of coverage rates for enrolled and covered children.

38. The congressionally-mandated study uses the term Hispanic. *See id.* at xiv.

39. *See id.* at 23.

40. *See id.* at xiv.

41. Prior to the SCHIP reauthorization of 2009, only lawful permanent resident immigrants who had continued presence in the United States and lawful resident status in the United States for five years could participate in federally-funded service programs, like SCHIP. *See* 8 U.S.C. § 1613(a) (2006). *See generally* discussion *infra* Part I.C (discussing the 2009 reauthorization of SCHIP).

42. *See* WOOLDRIDGE ET AL., *supra* note 34, at 33, 42. The study concludes, however, that despite the gains of the SCHIP program for children of color, racial disparities in access to health care were not completely eliminated. *Id.* at 42; *see also* Dolgin, *supra* note 20, at 703.

43. *See* Laura P. Shone et al., *Reduction in Racial and Ethnic Disparities After Enrollment in the State Children’s Health Insurance Program*, 115 *PEDIATRICS* 697, 697 (2005), available at <http://pediatrics.aappublications.org/content/115/6/e697.full.pdfhtml>.

44. *Id.* at 701.

45. *Id.* at 697.

shown in other studies,<sup>46</sup> SCHIP has provided a critical safety net to Latino-American and other children of color.

## B. Recession Politics Endangered SCHIP Gains

While access to health care for poor and modest-income children, generally, and for children of color, specifically, continued to improve, the current recessionary climate loomed. Indeed, the onset of the recession and growing budget deficits threatened SCHIP's continued success,<sup>47</sup> and the gains in getting more children access to quality and regular health care were in danger.<sup>48</sup> By 2007, as Professor Dolgin noted, "funding for SCHIP was not adequate even to continue covering children then enrolled in the program."<sup>49</sup> A few states froze enrollment and others altered enrollment requirements.<sup>50</sup> A few of the hardest hit populations were in states with high Latino-American populations, like Texas.<sup>51</sup> As a result, families who relied on SCHIP

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46. See e.g., WOOLDRIDGE ET AL., *supra* note 34, at xiv, xvi.

47. See Dolgin, *supra* note 20, at 703-04; see also VICTORIA WACHINO, CTR. ON BUDGET AND POLICY PRIORITIES, THE HOUSE BUDGET COMMITTEE'S PROPOSED MEDICAID AND SCHIP CUTS ARE LARGER THAN THOSE THE ADMINISTRATION PROPOSED 2 (2005), available at <http://www.cbpp.org/files/3-10-05health.pdf>.

48. See Dolgin, *supra* note 20, at 703.

49. *Id.* at 704 & n.104.

50. See *id.* at 703; see also ANNE DUNKELBERG, CTR. FOR PUB. POLICY PRIORITIES, TEXAS' CHALLENGE AS CONGRESS REAUTHORIZES CHIP: FEDERAL BLOCK GRANT FUNDING MUST GROW TO AVOID FUTURE TEXAS CHIP CUTS AND ALLOW FOR COVERAGE OF ELIGIBLE BUT NOT ENROLLED CHILDREN 2 (2007), available at <http://www.cppp.org/files/3/POP277SCHIP.pdf> ("Texas was not alone in adopting policies that reduced CHIP coverage. Between April 2003 and July 2004, nearly half of the states (23 states) adopted policies designed to reduce CHIP and children's Medicaid enrollment by making it harder for eligible children and families to get and keep coverage.").

51. See *id.* at 1, 3 ("Texas faces a special challenge in the federal debate, because Texas' CHIP enrollment (as of December 2006) remains more than 36% below September 2003 enrollment, so [it] ha[s] a much bigger number (and percentage) of eligible but not enrolled children than most states. Hundreds of thousands of uninsured Texas children will lose out if Congress only provides funds to support current enrollment. Texas' funds will not be enough to (1) allow [the] program's caseloads to recover, and/or (2) accommodate Texas' other planned new uses of SCHIP funds . . . . This means that Texas . . . children in particular will lose out unless Congress authorizes funds not just to continue current SCHIP operations, but instead enough to cover the hundreds of thousands of eligible, but not enrolled, uninsured children in [the] states.") (citations omitted); see also CHILDREN'S DEFENSE FUND, STATE OF AMERICA'S CHILDREN 2008 12, 14 (2007), available at <http://www.childrensdefense.org/child-research-data-publications/data/state-of-americas-children-2008-report-child-population.pdf> (noting that in 2007, there were approximately 6.6 million children in Texas; of that 6.6 million, approximately 3 million were Hispanic); NATIONAL COUNCIL OF LA RAZA, THE MEANING OF MEDICAID: A STATE-BY-STATE BREAKDOWN 5 (2011), available at [http://www.nclr.org/images/uploads/publications/Fact\\_Sheet\\_Hispanics\\_and\\_Medicaid\\_State\\_by\\_State07-19-2011.pdf](http://www.nclr.org/images/uploads/publications/Fact_Sheet_Hispanics_and_Medicaid_State_by_State07-19-2011.pdf). Between 2007-09, Hispanic children made up 51.1% of the total population under 18 in Texas. Of the population of Hispanic children under 18 in Texas, 24.3% were uninsured, and 44.8% were insured through Medicaid or SCHIP. *Id.*

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to provide for necessary health care services either went without health care services, endangering the health and well-being of their children, sacrificed in other areas of their lives such as housing and food allowances to pay for health costs, or used emergency services, even though they could not afford the cost of such care.<sup>52</sup> This emergency room health care is often one root cause for deep financial distress of families that are unable to pay high health care bills and default on their obligations, causing long-term problems for their financial, physical, and emotional health.<sup>53</sup>

As scheduled, the original SCHIP legislation was set to expire on September 30, 2007,<sup>54</sup> on the cusp of the deepening recession.<sup>55</sup> In 2007, due in part to the variation among states pursuant to federal guidelines in defining those families and children eligible for SCHIP,<sup>56</sup> many children who were part of poor to modest-income families—i.e., the families targeted for SCHIP coverage—were ineligible for coverage and thus remained uninsured pursuant to the guidelines established by the legislation and their respective states.<sup>57</sup> Perhaps not coincidentally, also around this same time, the costs of private insurance were increasing while more employers were discontinuing health care coverage benefits for their employees.<sup>58</sup> One result was that approximately 710,000 children in 2006, at least some of whom were the

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52. See Sarah R. Collins et al., *Gaps in Health Insurance: An All-American Problem*, 16 THE COMMONWEALTH FUND (2006), available at <http://www.commonwealthfund.org/Publications/Fund-Reports/2006/Apr/Gaps-in-Health-Insurance—An-All-American-Problem.aspx>; see also Johnson, *supra* note 1, at 226 (“Many of the client households served by Feeding America food banks report that their household incomes are inadequate to cover their basic household expenses. These households report being faced with tough decisions: 46% report having to choose between paying for utilities or heating fuel and food; 39% report having to choose between paying for rent or a mortgage and food; 34% report having to choose between paying for medical bills and food; and 35% report having to choose between transportation and food.”).

53. See, e.g., *The Twin Problems of Medical Debt and Underinsurance*, HOSPITALBILLHELP.ORG (2009), [http://www.hospitalbillhelp.org/public\\_policy](http://www.hospitalbillhelp.org/public_policy) (“Uninsured and underinsured patients who go to an emergency room are often charged many times what an insurer or government program actually pays.”).

54. The original SCHIP bill allotted funding for 1997-2007. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4901, 111 Stat. 251; see also Dolgin, *supra* note 20, at 708.

55. See discussion *infra* text accompanying note 62.

56. See discussion *supra* Part I.A.

57. See John K. Iglehart, *The Fate of SCHIP—Surrogate Marker for Health Care Ideology?*, 357 NEW ENG. J. MED. 2104, 2104-05 (2007), available at <http://www.nejm.org/doi/full/10.1056/NEJMp0706881>. In 2007, “[w]hile 24 states still use SCHIP to cover children with family incomes up to 200% of the poverty level and 8 states set their income thresholds below 200%, the other 18 states have extended their thresholds above 200% —16 of them to 250% or above. Through waivers approved by the Bush administration, 5 states cover pregnant women under SCHIP, 11 cover parents of enrolled children, and 14 cover other adults. Yet 90% of children enrolled in SCHIP in 2005 still had family incomes at or below 200% of the poverty level.” *Id.*

58. See Dolgin, *supra* note 20, at 708.

targeted beneficiaries of SCHIP, were left uninsured.<sup>59</sup> Half of these families had family incomes between 200% and 399% of the federal poverty level.<sup>60</sup> (For context, in 2007, 200% of the federal poverty level was approximately \$41,300 gross yearly income for a family of four).<sup>61</sup>

In response to the number of these still-uninsured children and in the time prior to the original September 30, 2007 expiration date of SCHIP, there was broad public and political support for the reauthorization and even for the expansion of SCHIP to include more lower and modest-income children.<sup>62</sup> The legislation to reauthorize SCHIP, deemed the Children's Health Insurance Program Reauthorization Act ("CHIPRA"),<sup>63</sup> passed both the House of Representatives and the Senate in 2007 with bipartisan support.<sup>64</sup> President George W. Bush, however, vetoed it.<sup>65</sup> Among other purported concerns,<sup>66</sup> President Bush asserted that reauthorization and expansion of the program amounted to federalization of health care and resulted in providing low cost or free insurance for middle-class families.<sup>67</sup> At about this time, the American health care debate assumed center stage as presidential candidates—including then-candidate Obama—addressed the health care crisis and discussed proposed solutions.<sup>68</sup> Moreover, the United States was feeling the effects of the

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59. See Iglehart, *supra* note 57, at 2104.

60. *Id.*

61. See U.S. DEP'T OF HEALTH & HUMAN SERVS., Annual Update of the HHS Poverty Guidelines, 72 Fed. Reg. 3147-01 tbl.1 (Jan. 24, 2007). The 200% amount is calculated by doubling the 100% amount provided for a family of four (\$20,650).

62. See Dolgin, *supra* note 20, at 708, 709 ("Governors overwhelmingly supported SCHIP's expansion.") (citation omitted).

63. Children's Health Insurance Program Reauthorization Act of 2007, H.R. 976 (2007); see Dolgin, *supra* note 20, at 709.

64. See Dolgin, *supra* note 20, at 709. The House of Representatives, which voted on August 1, 2007, passed the bill 225-204 with five Republicans voting for it and 220 Democrats voting for it. The Senate passed it 68-31 on August 2, 2007 with eighteen Republicans voting for it and forty-eight Democrats voting for it. See *Timeline of SCHIP Reauthorization: August 2007*, CHILD. DEF. FUND UPDATE (Child. Def. Fund Org/Healthy Child Campaign, D.C.), Aug. 2007, available at [http://cdf.childrensdefense.org/site/DocServer/SCHIP\\_timeline\\_January\\_18\\_2008.pdf?docID=6041](http://cdf.childrensdefense.org/site/DocServer/SCHIP_timeline_January_18_2008.pdf?docID=6041).

65. 153 CONG. REC. 11,203 (2007); see also *Timeline of SCHIP Reauthorization: August 2007*, *supra* note 64.

66. See Dolgin, *supra* note 20, at 729-30. President Bush voiced concern that "[t]his bill would shift SCHIP away from its original purpose . . . displace private health insurance for many children . . . and it raises taxes on working Americans." *Id.*

67. *Id.* at 712.

68. See, e.g., Kevin Sack, *Health Care*, N.Y. TIMES, Oct. 26, 2008, at WK07; Julie Rovner, *NPR 2008: Election Issues: Health Care*, NAT'L PUB. RADIO (Jan. 30, 2008), <http://www.npr.org/news/specials/election2008/issues/healthcare.html>.

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recession, fueling the fire to President Bush's reasons for cutting federal expenditures.<sup>69</sup>

Congress did not vote to override the veto but rather re-worked the legislation in an attempt to address President Bush's concerns<sup>70</sup> and passed a new version of CHIPRA, which was deemed CHIPRA II.<sup>71</sup> Once again, President Bush vetoed the legislation.<sup>72</sup> In response, Congress temporarily reauthorized the existing SCHIP—without any of the proposed measures for expansion—until March 31, 2009.<sup>73</sup>

Before the expiration of the temporary reauthorization measure, the newly inaugurated Obama administration reauthorized SCHIP.<sup>74</sup> On February 4, 2009, President Obama signed the Children's Health Insurance Reauthorization Act of 2009 ("CHIPRA 2009").<sup>75</sup> CHIPRA 2009 went into effect on April 1, 2009<sup>76</sup> with allocated funding of approximately \$69 billion,<sup>77</sup> including approximately \$33 billion in additional funding<sup>78</sup> for the years 2009 through 2013.<sup>79</sup> In addition to reauthorizing the existing benefits, CHIPRA 2009 expanded the program to add approximately four million children to those eligible

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69. *Bush Focuses on Economy in 'Period of Uncertainty'*, CNN (Jan. 28, 2008), [http://articles.cnn.com/2008-01-28/politics/sotu.main\\_1\\_earmarks-spending-bills-president-bush?\\_s=PM:POLITICS](http://articles.cnn.com/2008-01-28/politics/sotu.main_1_earmarks-spending-bills-president-bush?_s=PM:POLITICS) ("Bush said he would cut or eliminate 151 'wasteful or bloated' government programs in his budget for 2009 — cuts he said would total \$18 billion of a budget that amounted to \$3 trillion in 2008 . . . . He vowed to veto any measure that does not cut by half the number and cost of congressional 'earmarks.'").

70. Dolgin, *supra* note 20, at 709.

71. Children's Health Insurance Program Reauthorization Act of 2007, H.R. 3963 (2007); Dolgin, *supra* note 20, at 709.

72. 153 CONG. REC. 15,382 (2007); *see also* Dolgin, *supra* note 20, at 709-10.

73. S. 2499, 110th Cong. § 1 (2007); *see also* Dolgin, *supra* note 20, at 709.

74. *See* discussion *infra* note 75.

75. Children's Health Insurance Program Reauthorization Act of 2009, Pub. L. No. 111-3 § 3(a), 123 Stat. 8; 155 CONG. REC. 1039-01 (2009); *see also* Robert Pear, *Obama Signs Children's Health Insurance Bill*, N.Y. TIMES, Feb. 5, 2009, at § 3(a) 04A.

76. Children's Health Insurance Program Reauthorization Act of 2009.

77. *See* GEORGETOWN UNIV. HEALTH POLICY INST. CTR. FOR CHILD. & FAMILIES, THE CHILDREN'S HEALTH INSURANCE PROGRAM REAUTHORIZATION ACT OF 2009: OVERVIEW AND SUMMARY 4 (2009), available at <http://ccf.georgetown.edu/index/cms-filesystem-action?file=ccf%20publications/federal%20schip%20policy/chip%20summary%2003-09.pdf> ("Over the four and a half year period covered by the law, the national allotments will total \$68.9 billion."); *see also id.* at n.3 (describing how this total is different from the Congressional Budget Office's (CBO) estimate of \$32.8 billion, which is just the additional federal spending on SCHIP, Medicaid, and other programs "above 'baseline' levels (i.e., spending that would have occurred even in the absence of CHIPRA [2009]) that will result from adopting CHIPRA [2009]"); Jennifer Sullivan, *More Funding for CHIP, Different Rules: How Does CHIPRA Change Chip Funding?*, FAMILIES USA BRIEF (Families USA Org., D.C.), June 2009 at 1, available at <http://familiesusa2.org/assets/pdfs/chipra/funding.pdf>.

78. *See* GEORGETOWN UNIV. HEALTH POLICY INST. CTR. FOR CHILD & FAMILIES, *supra* note 77, at 4; Dolgin, *supra* note 20, at 704.

79. GEORGETOWN UNIV. HEALTH POLICY INST. CTR. FOR CHILD & FAMILIES.

for the program.<sup>80</sup> These additional beneficiaries were of two types. First, CHIPRA 2009 expanded coverage (through states' options) to children in less poor families who previously were excluded from SCHIP but typically did not have high enough income to afford private health insurance.<sup>81</sup> In this sense, CHIPRA 2009 allowed states to raise the eligibility ceiling for their programs.<sup>82</sup> Second, under the Immigrant Children's Health Improvement Act ("ICHIA"),<sup>83</sup> a part of CHIPRA 2009, the expansion included coverage to eligible immigrant children who are lawfully in the United States<sup>84</sup> and to lawfully present pregnant immigrants<sup>85</sup> who were ineligible for SCHIP before CHIPRA 2009.<sup>86</sup> Specifically, CHIPRA 2009 allowed states the option to use federal allocations to extend coverage to these immigrant children and pregnant women who had not been in their lawfully present immigrant status for five years,<sup>87</sup> which is required to receive most governmental assistance<sup>88</sup> pursuant to provisions of the Personal

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80. Dolgin, *supra* note 20, at 704. The actual numbers of projected covered children are difficult to estimate. According to the CHIPRA Guidance Memo, the four million additional insured number also includes a small number of previously-excluded adults. See Children's Health Insurance Program Reauthorization Act of 2009 § 112(a)(1); Letter from Center for Medicaid & State Operations to State Health Official, at 3-4 (Apr. 17, 2009), available at <https://www.cms.gov/SMDL/downloads/SO041709.pdf>. Although it is not the focus of this Essay, the adults covered under CHIPRA 2009 and now SCHIP are generally parents of children covered by SCHIP who otherwise would not be insured. See A CBO PAPER, *supra* note 28, at 1-2 ("A number of states have used waiver authority to expand coverage under SCHIP to adults. Covering parents may help to increase participation among children, because parents who are eligible may be more likely to enroll their children also. In particular, section 1115 of the Social Security Act gives the Secretary of Health and Human Services the authority to waive certain statutory and regulatory requirements of Medicaid and SCHIP. The Secretary has used that authority to allow states to expand eligibility for SCHIP to low-income parents, pregnant women, and adults without children. As a condition for those waivers, states are required to cover those populations with funds not used to cover children . . . . Of the 18 states that have obtained section 1115 waivers, 13 have expanded coverage to parents, related caretakers, and legal guardians, as well as pregnant women. Adults without children are currently covered in four states; however, the Deficit Reduction Act of 2005 (P.L. 109-171) prohibits the approval of such waivers in the future.") (citation omitted).

81. Children's Health Insurance Program Reauthorization Act of 2009 § 301(a)(1); see Letter from Center for Medicaid & State Operations to State Health Official, *supra* note 80, at 3.

82. See Letter from Center for Medicaid & State Operations to State Health Official, *supra* note 80, at 1.

83. Children's Health Insurance Program Reauthorization Act of 2009 § 214(a)(2); see also *President Obama Signs ICHIA into Law!*, NAT'L IMMIGR. L. CENTER (Feb. 9, 2009), <http://www.nilc.org/immspbs/cdev/ICHIA/ichia003.htm#sen2>.

84. Children's Health Insurance Program Reauthorization Act of 2009 § 214(a)(2).

85. *Id.*

86. See *id.*

87. See *id.*; see also *supra* note 41.

88. See TANYA BRODER & JONATHAN BLAZER, NAT'L IMMIGR. L. CENTER, OVERVIEW OF IMMIGRANT ELIGIBILITY FOR FEDERAL PROGRAMS 1 (2010), available at <http://www.nilc.org/immspbs/special/overview-immeligfedprograms-2010-07.pdf>.



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Responsibility and Work Opportunity Act of 1996.<sup>89</sup> Thus, these lawfully present, income-eligible immigrant children and pregnant women can participate in SCHIP without having to wait five years for insurance coverage, as they did before CHIPRA 2009.<sup>90</sup> Of course, as has always been the case, undocumented immigrants are not eligible for SCHIP coverage<sup>91</sup> in the same way that they are ineligible for almost all federally-funded public benefits.<sup>92</sup>

The 2009 reauthorization of SCHIP provides welcome changes to low- and modest-income Latino-Americans and immigrants. Although the states still control eligibility criteria and the general implementation of the program,<sup>93</sup> federal money to support the continuation of SCHIP is critical. Rather than choose the easier path of cutting or drastically scaling back this health care funding for the poor and for immigrants in the face of the expanding recession, Congress and President Obama saw the need to provide minimal health insurance for this population. Although it is still too early for broad research and testing as to CHIPRA 2009's efficacy in reaching children in SCHIP,<sup>94</sup> preliminary data suggests that the program is continuing to build on the previous decade of SCHIP's success in insuring children and families that otherwise would not have had access to health care.<sup>95</sup>

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89. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 401(a), 402(b), 403(a), 421(a), (b)(1), 110 Stat. 2105.

90. See Children's Health Insurance Program Reauthorization Act of 2009 § 214(a)(2). Even though states and jurisdictions were barred from using federally allocated dollars to cover immigrants prior to CHIPRA 2009, some states (and the District of Columbia) used state funds to cover immigrants who were otherwise excluded from Medicaid and/or SCHIP under the federal restrictions. See KAISER COMM'N ON MEDICAID & THE UNINSURED, *CHIP TIP: NEW FEDERAL FUNDING AVAILABLE TO COVER IMMIGRANT CHILDREN AND PREGNANT WOMEN 1* (2009), available at <http://www.kff.org/medicaid/upload/7915.pdf>.

91. *Id.*

92. See BRODER & BLAZER, *supra* note 88, at 2.

93. See Children's Health Insurance Program Reauthorization Act of 2009 § 203(a); see also *A CBO Paper*, *supra* notes 28 and 29 (describing state systems for establishing SCHIP implementation and eligibility requirements).

94. The Mathematica Policy Institute is currently conducting a ten-state survey as to CHIPRA 2009's effects and progress with a project date range of 2010-2013. See MATHEMATICA POLICY RESEARCH, *CHIPRA 10-State Evaluation*, [http://www.mathematica-mpr.com/Health/CHIPRA\\_10state.asp](http://www.mathematica-mpr.com/Health/CHIPRA_10state.asp) (last visited Jan. 3, 2012).

95. See DEP'T OF HEALTH AND HUMAN SERVS., *CHILDREN'S HEALTH INSURANCE PROGRAM REAUTHORIZATION ACT: ONE YEAR LATER CONNECTING KIDS TO COVERAGE 7* (2010), available at [http://www.insurekidsnow.gov/chip/chipra\\_anniversary\\_report.pdf](http://www.insurekidsnow.gov/chip/chipra_anniversary_report.pdf) ("The cumulative value of these multi-year advances is confirmed by Census Bureau data released in September 2009, indicating the number of uninsured children in the United States is at the lowest level since 1987. In 2008, there were 7.3 million uninsured children, a decline of 800,000 from 8.1 million in 2007. With employer-based coverage becoming less available and affordable for children and adults alike, Medicaid and CHIP are chiefly responsible for the insurance gains among children,

Providing such health insurance coverage is one important key in keeping families, specifically Latino-Americans and immigrants, likely to be living on the edge of poverty,<sup>96</sup> out of extreme poverty.<sup>97</sup> Families that are able to afford to take proactive and preventative measures in their health care are financially, physically, and emotionally healthier.<sup>98</sup> Without worrying about exorbitant health care costs, families are less likely to end up homeless and/or hungry.<sup>99</sup> With key and essential needs met, parents and children enjoy greater health<sup>100</sup> and other measures of success.<sup>101</sup>

C. The Keys to SCHIP Success: Focus on Children and Keep Immigrants in the Shadows

The 2009 reauthorization of SCHIP provides an opportunity to explore the reasons behind the success of the measure. When stretched budgets call for fiscal frugality, it is somewhat surprising that a high-dollar measure aimed at helping poor and modest-income families succeeded. What was it, then, that saved SCHIP when other legislative efforts, like the DREAM Act, failed? This Part briefly reviews the backdrop of the 2007 CHIPRA I and CHIPRA II congressional initiatives and the eventual success of CHIPRA 2009 and details how Congress and the general public focused on the importance of the health care measure to children. Moreover, even though the enacted

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more than offsetting losses in private coverage. The data also show that while significant disparities continue to exist, the coverage progress achieved in recent years has helped to reduce the disproportionately high uninsurance rate experienced by Hispanic children and other racial and ethnic minority children and to narrow the difference in coverage rates across groups of children.”) (citation omitted).

96. See *supra* discussion Introduction.

97. See generally Johnson, *supra* note 1 at 225, 226 (describing the 37 million people—70% of those households fall below the federal poverty line and 10% are homeless—that Feeding America, a domestic hunger-relief charity, serve, many of which cannot cover basic expenses).

98. See Amy Finkelstein et al., *The Oregon Health Insurance Experiment: Evidence from the First Year* 29 (Nat’l Bureau of Econ. Research, Working Paper No. 17190, 2011), available at [http://www.nber.org/papers/w17190.pdf?new\\_window=1](http://www.nber.org/papers/w17190.pdf?new_window=1); Jeanne Pinder, *Insuring the Uninsured: Study Finds Multiple Benefits*, CLEARHEALTHCOSTS (July 8, 2011), <http://clearhealthcosts.com/2011/07/insuring-the-uninsured-oregon-study-finds-multiple-benefits/> (evaluating a study done in Oregon, which concluded that those who are insured are happier, healthier, and more financially stable than the uninsured).

99. See *supra* discussion Introduction (suggesting that economic hardships on low-income families can lead to homelessness and other stressors on the family).

100. See Finkelstein et al., *supra* note 98, at 3.

101. *Id.*; see also *The State of the American Child: The Impact of Federal Policies on Children Before Subcomm. On Children and Families Comm. on Health, Educ., Labor and Pensions* (2010) (testimony of Cecilia Elena Rouse, Member, Council of Economic Advisors), available at <http://www.whitehouse.gov/administration/eop/cea/speeches-testimony/state-of-the-american-child>.

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CHIPRA 2009 legislation covers some immigrant children and pregnant women, the debate did not intensely focus on those recipients. Thus, it is the emphasis on children and *away* from immigrants that helped push SCHIP to successful reauthorization.

During the 2007 CHIPRA I and II congressional efforts, President Bush's vetoes of the measures were signals, he stated, of fiscal responsibility.<sup>102</sup> He stated that the SCHIP program and the congressional efforts to expand the program to cover more children amounted to too much governmental intervention in health care and would displace private health insurance for families.<sup>103</sup> Yet, even Republican supporters of the bill challenged the President's assertions. In a September 26, 2007 speech on the Senate floor regarding the SCHIP reauthorization and in anticipation of Bush's veto of the legislation, Senator Charles Grassley (R-Iowa) took President Bush to task for painting the program as "socialized medicine."<sup>104</sup> Indeed, Senator Grassley went so far as to remind President Bush of his own words in 2004 during the presidential campaign to expand coverage for children.<sup>105</sup> As then-candidate Bush proclaimed: "In a new term, we will lead an aggressive effort to enroll millions of poor children who are eligible but not signed up for the government's health insurance programs."<sup>106</sup>

This effort to provide children with health care took center stage in the 2007 and 2009 CHIPRA political debates. Bi-partisan advocates, like Republican Senator Grassley in 2007<sup>107</sup> and the Democratic Policy Committee in 2009,<sup>108</sup> concentrated on the seemingly non-controversial aim of helping children who were suffering in the economic recession. The January 2009 Democratic Policy Committee Fact Sheet discussed and advocated for CHIPRA Reauthorization by boldly proclaiming: "The CHIP Reauthorization Act of 2009 Invests in the

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102. See Inglehart, *supra* note 57, at 2104.

103. *Id.* at 2105; see also Dolgin, *supra* note 20, at 709.

104. Inglehart, *supra* note 57, at 2105; see 153 CONG. REC. S12128-01 (daily ed. Sept. 26, 2007) (statement of Sen. Charles Grassley).

105. Inglehart, *supra* note 57, at 2106.

106. *Id.*; George W. Bush, Nomination Acceptance Speech at the 2004 Republican National Convention (Sept. 2, 2004), available at <http://www.presidentialrhetoric.com/campaign/rnc-speeches/bush.html>.

107. See *supra* notes 104-05 and accompanying text.

108. See DEMOCRATIC POLICY COMM., THE CHIP REAUTHORIZATION ACT OF 2009 INVESTS IN THE HEALTH OF AMERICA'S MOST PRECIOUS RESOURCE: OUR CHILDREN (2009), [http://dpc.senate.gov/dpcdoc.cfm?doc\\_name=fs-111-1-8](http://dpc.senate.gov/dpcdoc.cfm?doc_name=fs-111-1-8). SCHIP is also widely known as "CHIP." See *Overview of the National CHIP Policy*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <https://www.cms.gov/NationalCHIPPolicy/> (last modified Aug. 4, 2011).

Health of America's Most Precious Resource: Our Children."<sup>109</sup> Citing public opinion polls and bi-partisan efforts to pass the legislation, the Democratic Policy Committee Fact Sheet underscored the broadly-accepted and touted aims of CHIPRA 2009: the legislation is about "the nearly ten million children who may not have health coverage if CHIP is not reauthorized . . . keeping kids healthy enough to be productive in school and throughout their lives . . . [and] meeting our common goal of a healthy America."<sup>110</sup> Riding a tide of concern for those most affected by the implications of the recession—America's needy children—the reauthorization of SCHIP through CHIPRA 2009 was on a path to legislative success.

On the other hand, the debate about provisions in the expanded portion of CHIPRA 2009 covering lawfully present immigrants was quieter than advocates for immigrants and immigrant health care equality may have expected. To be sure, opponents to CHIPRA 2009's inclusion of lawfully present immigrants, who had not achieved continued residency and five years of lawful permanent resident status, decried the legislation, using the familiar rhetoric of burdening real Americans while rewarding "illegal aliens."<sup>111</sup> Still, Republicans in opposition to the legislation focused more directly on critiquing CHIPRA 2009 as another step towards socialized medicine and less vehemently about the expansion of coverage for lawfully present immigrant children and pregnant women.<sup>112</sup>

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109. See DEMOCRATIC POLICY COMM., *supra* note 108.

110. *Id.*

111. As a representative example, one report quoted Senator John Ensign (R-Nevada) voicing his opposition to the CHIPRA in 2009: "It would seem to me that we are giving more incentives for folks to come to the United States, not just to participate in the American dream, but to get on the government dole . . . . And I think this is exactly the wrong direction we should be going with this legislation." Julie Rovner, *Immigration Debate Roils Children's Health Bill*, NAT'L PUB. RADIO (Jan. 27, 2009), <http://www.npr.org/templates/story/story.php?storyId=99884425>. Similarly, Senator Grassley, a staunch proponent of SCHIP reauthorization in 2007 was among the Republicans who did not vote for the legislation in 2009, citing his opposition to the expansion of the coverage and the lack of partisanship in supporting amendments expanding the scope of the program. See *id.* (quoting Senator Grassley: "I don't think undoing agreements that have been made and veering toward partisanship instead of cooperation is the change that people believe in.").

112. In line with what President Bush asserted while vetoing the earlier versions of the legislations, Republican lawmakers in 2009 argued that the program would hurt private insurers and draw too many children and families away from available and affordable private insurance options to reliance on government-sponsored insurance. As Senator Jon Kyl (R-Arizona) summarized: "We're going to replace a lot of private insurance with government insurance." Kevin Freking, *Republicans Oppose Broader Children's Health Bill*, ASSOCIATED PRESS, Jan. 26, 2009, available at *SCHIP Reauthorization (2009): Media*, GEORGETOWN UNIV. HEALTH POLICY INST. CTR. FOR CHILDREN AND FAMILIES, <http://ccf.georgetown.edu/index/media-reauthorization> (click on the article title).

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Thus, an important component of the success of the 2009 reauthorization of SCHIP is how the legislation was labeled and lobbied. The focus by Democratic and Republican supporters alike was on the need to provide poor and modest-income children with health care coverage.<sup>113</sup> Although CHIPRA 2009 contained a strong and important provision expanding coverage to certain immigrants, supporters deflected the issue, purposefully keeping the immigrant in the shadows of the debate so as to ensure the legislation's eventual passage. This strategy that was, of course, ultimately successful was summarized perfectly by Senator Richard J. Durbin (D-Illinois) during the 2009 debate on the legislation: "The bottom line is: This is a debate about children's health coverage . . . . This is not a debate about immigration."<sup>114</sup>

## II. THE DEATH OF THE DREAM

### A. A Brief History of the DREAM Act

Unlike the health care success of SCHIP, legislative reform aimed at educating some of the best and brightest immigrant children in the United States did not fare as well. Advocates and lawmakers have tried for a decade to pass landmark legislation that would have created a path to United States citizenship for undocumented immigrant students and members of the United States military.<sup>115</sup> In December 2010, however, the DREAM Act died in the United States Senate.<sup>116</sup>

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113. Focusing on the needs of families and children is non-controversial, as Senator Olympia J. Snowe (R-Maine) alluded to, defending her vote for the CHIPRA 2009 and stating, "You would have thought this issue would have been clear sailing on both sides." Ceci Connolly, *Senate Passes Health Insurance Bill for Children; Immigrant Clause Opens Rift*, WASH. POST, Jan. 30, 2009, at A1.

114. *Id.*

115. AM. IMMIGRATION COUNCIL, IMMIGRATION POLICY CTR., *THE DREAM ACT: CREATING OPPORTUNITIES FOR IMMIGRANT STUDENTS AND SUPPORTING THE U.S. ECONOMY* 5 (2011), *available at* [http://www.immigrationpolicy.org/sites/default/files/docs/Dream\\_Act\\_updated\\_051811.pdf](http://www.immigrationpolicy.org/sites/default/files/docs/Dream_Act_updated_051811.pdf) (addressing the DREAM Act's introduction in 2001, various votes throughout the years through 2010, and supporters of the bill).

116. Procedural and political maneuvering abounded in the House and Senate versions of the DREAM Act legislation that was considered in December 2010. Professor Michael A. Olivas, an education law expert and an expert on the DREAM Act, wrote a Postscript to his 2009 article, *Comprehensive Immigration Reform Symposium: Problems, Possibilities and Pragmatic Solutions: The Political Economy of the DREAM Act and the Legislative Process: A Case Study of Comprehensive Immigration Reform*, 55 WAYNE L. REV. 1757 (2009) [hereinafter Olivas, *The Political Economy*] discussing the process that ultimately led up to the DREAM Act's demise in 2010.

On December 8, 2010, the House attached the DREAM Act (H.R. 6497) to another moving House bill, H.R. 5281, and passed it: 216 to 198. This was the first time that the

The core ideas of the DREAM Act were first legislatively introduced in the United States Congress in 2001.<sup>117</sup> At its heart, the DREAM Act sought to provide a pathway to United States citizenship for undocumented people who were brought to the United States as children by their parents or guardians and who maintain an unlawful immigration status in the United States.<sup>118</sup> Arguing that these children were brought to this country by no fault of their own<sup>119</sup> and now show immense promise to contribute positively to this country,<sup>120</sup>

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House had ever voted upon a version of the DREAM Act since its introduction in 2001. Initially, the Senate was scheduled to take a procedural vote on its version of DREAM (S. 3992), but instead, Senate Democrats voted 59-40 to withdraw S. 3992 and focus on the bill passed on December 8 by the House. On December 18, 2010, the Senate took up the cloture motion (technically, “the Motion to Invoke Cloture on the Motion to Concur in the House Amendment to the Senate Amendment No. 3 to H.R. 5281, the Removal Clarification Act of 2010”). Democratic backers of the legislation fell short of the sixty votes required to move the DREAM Act legislation forward, with a vote of 55-41 in favor.

MICHAEL A. OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND: PLYLER V. DOE AND THE EDUCATION OF UNDOCUMENTED SCHOOLCHILDREN 85 (2012) [hereinafter OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND].

117. See H.R. 1918, 107th Cong. (2001); S. 1291, 107th Cong. (2001); Olivas, *The Political Economy*, *supra* note 116, at 1759. More recently, the DREAM Act was introduced in Congress in the 2009-2010 session as: DREAM Act of 2010, H.R. 6497, 111th Cong.; DREAM Act of 2009, S. 729, 111th Cong.; American Dream Act, H.R. 1751, 111th Cong. (2009). In May 2011, the DREAM Act was introduced in the Senate as S. 952, 112th Cong. (2011) and in the House of Representatives as H.R. 1842, 112th Cong. (2011).

118. The DREAM Act, as previously introduced, would have applied to young undocumented immigrants who either entered the country illegally or who entered legally but overstayed their lawful presence in the United States such that they are currently undocumented. See S. 952, 112th Cong. § 3(b)(1) (2011); see also Aimee Deverall, *Make the Dream A Reality: Why Passing the DREAM Act Is the Logical First Step in Achieving Comprehensive Immigration Reform*, 41 J. MARSHALL L. REV. 1251, 1253 (2008).

119. One author, for example, in advocating for the passage of the DREAM ACT analogized the undocumented immigrant student’s predicament to that of battered spouses and children: “Just like victims of spousal abuse, the applicants covered under this provision would obtain access to conditional residency to rectify a harm that was done to them. These immigrants did not ask to be brought to the United States as minors, but they did grow up here, attended school here, and became ‘American.’” Cecelia M. Espenosa, *Relief for Undocumented Students: The DREAM Act*, 56 FED. LAW. 44, 45 (2009).

120. See, e.g., Deverall, *supra* note 118, at 1251 (discussing the case of Dan-el Padilla, the salutatorian of his class at Princeton University who was also an undocumented immigrant); David Montgomery, *A Rare Reprieve from Immigration Limbo; Indian Teen Illegally in U.S. Is Allowed to Pursue College in Only Home He’s Known*, WASH. POST, Aug. 12, 2010, at A01 (describing story of Yves Gomes, a student who graduated with a 3.8 GPA and took Advanced Placement courses in high school in Maryland but faced deportation back to India, a country he had left with his parents when he was fourteen-months-old); Prerna Lal: *Prominent DREAM Act Advocate Threatened with Deportation*, WE ARE AMERICA, <http://www.weareamericastories.org/written/prerna-lal-prominent-dream-act-advocate-threatened-with-deportation/> (last visited Oct. 10, 2011) [hereinafter *Prerna Lal*] (“Prerna Lal is a George Washington University law student who helped found DreamActivist, the immigrant youth-led DREAM Act organization.”); *Mariano’s Story: Civil Engineering Student, Long Time Connecticut Resident Could Be Deported*, WE ARE AMERICA, <http://www.weareamericastories.org/written/marianos-story-civil-engineering-student-on-the-eve-of-being-deported/> (last visited Oct. 11, 2011) [hereinafter *Mariano’s Story*].

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DREAM Act proponents aimed to allow these children to stabilize their immigration status by qualifying for cancellation of removal relief and for adjustment of their immigration status to one of a conditional lawful permanent resident if they, in short, were pursuing a college education or were serving in the United States Armed Forces.<sup>121</sup>

Since its original introduction and over the next nine years, versions of the DREAM Act were introduced, debated, withdrawn, and ultimately rejected.<sup>122</sup> On December 8, 2010, however, the House of Representatives passed the DREAM Act<sup>123</sup> and with broad bi-partisan support in Congress and from President Obama,<sup>124</sup> the possibility of the DREAM Act becoming law was at an all-time high.<sup>125</sup> Moreover, public support for the DREAM Act in 2010 reached fever-pitch proportions as advocates, intended beneficiaries, and other supporters rallied across the country and engaged in broad social media campaigning.<sup>126</sup> Undocumented immigrants—including high school,

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121. In the most recent versions of the legislation introduced in May 2011, provisions regarding the cancellation of removal, adjustment of status, and conditional lawful permanent resident status process of eligible beneficiaries are found at DREAM Act of 2011, S. 952, 112th Cong. § 3 (2011) and DREAM Act of 2011, H.R. 1842, 112th Cong. §3 (2011). See, e.g., Michael A. Olivas, *IIRARA, The DREAM Act, and Undocumented College Student Residency*, 30 J.C. & U.L. 435, 462-63 (2004) [hereinafter Olivas, *IIRARA*]; Deverall, *supra* note 118, at 1253 & n.13, 14 (discussing the 2007 version of the Dream Act) (“The DREAM Act would enable undocumented students who (i) have lived in the United States for at least five years, (ii) have graduated from high school, and (iii) are ‘of good moral character’ to apply for conditional permanent resident status. They could then petition for removal of the conditional status after serving honorably in the Armed Forces for at least two years or successfully attending at least two years of college.”) (citing DREAM Act of 2007, S. 2205, 110th Cong. §§ 3(a)(1), §4(d)(1)(D)(2i) (2007); H.R. 1275, 110th Cong. (2007)); *DREAM Act: Summary*, NAT’L IMMIGR. L. CENTER (updated May 2011), available at <http://www.nilc.org/> (search “Dream Act”; then follow “Dream Act: Summary” hyperlink) (last visited Sept. 27, 2011).

122. See Olivas, *The Political Economy*, *supra* note 116, at 1785. Professor Olivas’s article is an excellent summary of the history of the DREAM Act. See also OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND, *supra* note 116, at 70-71; Espenosa, *supra* note 119, at 46-47 (briefly discussing the history of the DREAM Act). The Senate and House of Representative versions of the DREAM Act legislation have had numerous titles and captions since 2001. See Olivas, *The Political Economy*, *supra* note 116, at 1785-89.

123. See Julia Preston, *House Backs Legal Status for Many Young Immigrants*, N.Y. TIMES, Dec. 9, 2010, at A38 [hereinafter Preston, *House Backs Legal Status*]; Teresa Watanabe, *House of Representatives Narrowly Approves Dream Act; Senate Must Now Vote on Immigration Bill*, L.A. TIMES (Dec. 8, 2010, 6:05 PM), <http://latimesblogs.latimes.com/lanow/2010/12/dream-act.html>.

124. See Julia Preston, *Bill to Grant Legal Status to Immigrant Students Heads to a Vote in the Senate*, N.Y. TIMES, Dec. 17, 2010, at A10 [hereinafter Preston, *Bill to Grant Legal Status*]. “The Obama administration joined with Latino leaders and immigrant advocates on Friday in a full-court press on behalf of a bill to grant legal status to . . . illegal immigrant students . . .” *Id.*

125. See Preston, *House Backs Legal Status*, *supra* note 123, at A38.

126. See Melissa Ludwig, *DREAM Act Rally Ends with Arrests*, SAN ANTONIO EXPRESS-NEWS, Nov. 29, 2010, at A1; *DREAM Act Rally in Tucson: Four Detained*, HUFFINGTON POST, [http://www.huffingtonpost.com/2010/05/18/dream-act-rally-in-tucson\\_n\\_580733.html](http://www.huffingtonpost.com/2010/05/18/dream-act-rally-in-tucson_n_580733.html) (last up-

college, and graduate students, and those wishing to enlist in the United States military—who hoped to legalize their status through the passage of the DREAM Act, went public regarding their undocumented status and their plight in an effort to convince lawmakers to support and pass the Act.<sup>127</sup> Indeed, some were even arrested in their protest efforts,<sup>128</sup> which opened the doors for their removal from the country.<sup>129</sup>

For example, on the steps of the federal courthouse in Milwaukee, Wisconsin on a summer day in 2010, one young student stepped forward. Maricela Aguilar was a nineteen-year-old college student originally from Mexico.<sup>130</sup> Maricela's parents brought her to the United States when she was three-years-old.<sup>131</sup> A high school honor student in Wisconsin, Maricela received a full tuition scholarship to Marquette University upon graduation and enrolled at the university.<sup>132</sup> That day on the courthouse steps, Maricela publicly revealed that she was an undocumented immigrant.<sup>133</sup> Like numerous other young people who succeeded academically and/or aspired to serve in

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dated July 18, 2010, 5:12 AM); see, e.g., *DREAM Act Rally in North Carolina Leads to Arrests*, FOX NEWS LATINO (Sept. 7, 2011), <http://latino.foxnews.com/latino/politics/2011/09/07/immigration-rally-leads-to-arrests-at-cpcc/> (briefly discussing a DREAM Act protest in which police arrested over a dozen people). Websites documenting the progress and setbacks of the DREAM Act link DREAM Act advocates from around the country. See WE ARE AMERICA, [www.weareamericastories.org](http://www.weareamericastories.org) (last visited Oct. 18, 2011); *Welcome to the DREAM Act Portal*, DAP 218:60, [www.dreamact.info](http://www.dreamact.info) (last visited Oct. 18, 2011); *Immigration Law & Policy: Immigrant Student Adjustment/DREAM Act*, NAT'L IMMIG. L. CENTER, <http://www.nilc.org/immlawpolicy/dream/> (last visited Oct. 18, 2011, 12:40 AM).

127. See TARA BHRAMPUR, *Students Disclose Illegal Status as Part of Push for Immigration Law Reform*, WASH. POST, July 21, 2010, at A3 (describing undocumented students' arrest at the United States Capitol for protesting in support of the DREAM Act); KATE LINTHICUM, *L.A. Drops Charges Against Westwood Protesters Who Supported DREAM Act*, L.A. TIMES, Mar. 4, 2011, at AA3 (discussing the city government decision not to prosecute undocumented students arrested in Los Angeles in May 2010 for protesting in support of the DREAM Act); JULIA PRESTON, *Illegal Immigrant Students Protest at McCain Office*, N.Y. TIMES, May 17, 2010, at A15 (describing how undocumented students—three of whom were arrested—staged a sit-in at Senator McCain's office asking for DREAM Act support) [hereinafter Preston, *Illegal Immigrant Students Protest*].

128. See Preston, *Illegal Immigrant Students Protest*, *supra* note 127, at A15; Bhrampour, *supra* note 127, at A3.

129. See Preston, *Illegal Immigrant Students Protest*, *supra* note 127, at A15 (“Four of the protesters, including three who were in the country illegally, are arrested . . . . The three were expected to face deportation proceedings.”).

130. See Julia Preston, *After False Dawn, Anxiety for Students Who Are Illegal Immigrants*, N.Y. TIMES, Feb. 9, 2011, at A15 [hereinafter Preston, *False Dawn*].

131. *Id.*

132. *Id.*

133. *Id.*



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the United States military,<sup>134</sup> Maricela's revelation of her status was in hopes of changing the immigration policy rhetoric over what it meant to be an undocumented immigrant.<sup>135</sup> These stories of the undocumented immigrant dreamer<sup>136</sup> served to show legislators, and all Americans, the face of the American dream. Thus, with bi-partisan Congressional support, a President that advocated for its passage, and rallies of supporters on the actual and virtual streets of America, 2010 seemed to be the pivotal year for the DREAM Act to finally become law, welcoming Maricela and other deserving young people onto the path of lawful residence in the United States and perhaps one day, United States citizenship.

This hope was dashed, however, on December 18, 2010, when the legislation failed to garner the necessary sixty votes in the United States Senate to push the DREAM Act to a vote<sup>137</sup>—falling short by just five votes.<sup>138</sup> President Obama reacted to the failure of the Act, noting that “[i]t is disappointing that common sense did not prevail today.”<sup>139</sup>

Although the DREAM Act was reintroduced in the Senate<sup>140</sup> and House of Representatives<sup>141</sup> in May 2011, advocates are wary about the DREAM Act's success in the next legislative session. Campaigning for the 2012 elections and political posturing has contributed to increased political-party tensions, including tension over such issues as illegal immigration and the role of illegal immigration in the country's financial and national security problems.<sup>142</sup> Republican

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134. Young people who dream of serving in the United States military have also come forward even though they are undocumented. See Kevin Sieff, *Undocumented Immigrants in JROTC Programs Wait for the Next Battle Over the DREAM Act*, WASH. POST, Feb. 8, 2011, at B1. Although undocumented immigrants cannot currently serve in the United States Armed Forces, see 10 U.S.C. § 504(b)(1) (2006), passage of the DREAM Act would allow those otherwise eligible under the DREAM Act to serve in the military and put them on a path to lawful permanent residency and perhaps U.S. citizenship. See Sieff, *supra*; see also *Pedro's Story: DREAMer Granted Stay of Deportation*, WE ARE AMERICA, <http://www.weareamericastories.org/written/pedros-story-dreamer-granted-stay-of-deportation/> (last visited Oct. 18, 2011) (“Pedro Gutierrez . . . a young man whose lifelong dream of serving in America's military as a Marine was threatened by his imminent deportation.”).

135. See Preston, *False Dawn*, *supra* note 130, at A15.

136. See *supra* note 127 and accompanying text.

137. See Lisa Mascaro & Michael Muskal, *Dream Act Fails to Advance in Senate*, L.A. TIMES, Dec. 18, 2010, <http://articles.latimes.com/2010/dec/18/news/la-pn-senate-dream-20101219>.

138. See *id.*

139. *Id.*

140. DREAM Act of 2011, S. 952, 112th Cong. (2011).

141. DREAM Act of 2011, H.R. 1842, 112th Cong. (2011).

142. See, e.g., Trip Gabriel & Edward Wyatt, *At Rallies, 2 Candidates Deliver Blistering Attacks on Illegal Immigration*, N.Y. TIMES, Oct. 15, 2011, at 22. It is difficult to summarize the

members of Congress who previously supported the DREAM Act have abandoned their approval of the measure.<sup>143</sup> Moreover, ranking members of Congress have stated that the DREAM Act has little chance for passage in the near future.<sup>144</sup> Thus, it is unlikely that the DREAM Act will become law in the near future in the Republican-controlled House of Representatives and with ongoing and extreme anti-immigrant sentiment. Ten years after its conception and legislative introduction, it appears as if the DREAM Act has died once

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debate in the United States surrounding illegal immigration and the rights of undocumented immigrants as is pertinent to the scope of this Essay. Comprehensive reform to the immigration system is a heated topic among and between Republicans and Democrats, conservatives, liberals, and Tea-Partiers. Articles, books, magazines, blogs, artwork, movies, plays and every other media have devoted pieces to the immigration debate. See, e.g., William Finnegan, *Borderlines*, NEW YORKER, July 26, 2010, at 19; *Plot Summary for Crossing Over (2009)*, IMDBPRO, <http://www.imdb.com/title/tt0924129/plotsummary> (last visited Oct. 28, 2011); Brent Johnson, IMMIGR. L. REFORM BLOG, <http://immigrationlawreformblog.blogspot.com/> (last visited Oct. 28, 2011). An exemplar of the way in which political posturing has grabbed a hold of the undocumented immigrant scapegoat was provided by Senator John McCain (R-Arizona), a former supporter of the DREAM Act, in June 2011 while his home state of Arizona suffered the ravages of devastating wildfires. See Dan Nowicki & Dennis Wagner, *Sen. John McCain Faces Uproar Over His Immigrant-Wildfire Link*, ARIZONA REPUBLIC, June 21, 2011, at B3. As reported by an Arizona newspaper, in response to a journalist question at a press conference as to how such fires could be prevented in the future, Senator McCain responded, "Well, first of all, we are concerned about, particularly areas down on the border, where there is substantial evidence that some of these fires are caused by people who have crossed our border illegally . . . . They have set fires because they want to signal others, they have set fires to keep warm and they have set fires in order to divert law-enforcement agents and agencies from them. So the answer to that part of the problem is get a secure border." *Id.* According to the newspaper report account of the press conference, when Senator McCain was asked which fires were set by undocumented immigrants, he responded, "All kinds . . . . I can't give you names." *Id.* See also discussion, *supra* Part II.A (discussing anti-immigrant hostilities).

143. See OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND, *supra* note 116, at 132, n.120. As one example, Republican Senator John McCain was an early supporter of the DREAM Act, and in fact, he co-sponsored a version of the legislation with Senator Orrin Hatch (R-Utah) in the 2003-2004 legislative session. See DREAM Act, S. 1545, 108th Cong. (2003). Yet, by the critical December 2010 Senate vote, Senator McCain had converted into a DREAM Act opponent and voted against the Act's passage. See Press Release, Statement by Senator John McCain on the DREAM Act (Dec. 18, 2010), available at [http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord\\_id=FA569B87-BE5A-A559-5A1F-8B3F0D770421](http://mccain.senate.gov/public/index.cfm?FuseAction=PressOffice.PressReleases&ContentRecord_id=FA569B87-BE5A-A559-5A1F-8B3F0D770421) ("With respect to the DREAM Act, I have great sympathy for the students who would benefit from passage of this legislation . . . . However, I cannot put the priorities of these students, as difficult and unfair in many respects as their situation is, ahead of my constituents and the American people who demand that the Federal government fulfill its Constitutional duty to secure our borders before we undertake other reforms."). Senator Hatch also voted against the DREAM Act in December 2010. See OLIVAS, NO UNDOCUMENTED CHILD LEFT BEHIND, *supra* note 116, at 86 (stating that "[the] ultimate irony was that . . . Sen. Hatch, who introduced the original legislation a decade earlier, did not vote for the DREAM Act.").

144. See Shankar Vedantam, *Passing of DREAM Act Is Very Unlikely in Next Congress, Republicans Say*, WASH. POST, Dec. 23, 2010, at A2. ("Congressional Republicans said in interviews . . . that their concerns about the [DREAM Act] remain strong, and both House and Senate GOP leaders said they would fight any attempt to legalize any of the 11 million undocumented immigrants in the country before the administration secured the nation's southern border with Mexico.").

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again, along with the dreams of thousands of talented young immigrants.

### B. What Killed the Dream? Recession Politics and the Ironic Power of the Undocumented Immigrant

Looking back, DREAM Act proponents and advocates wonder what more could have been done to secure the legislation's passage in 2010. But, in an era of recessionary belt-tightening and scapegoating, the DREAM Act was doubly doomed.

First, the DREAM Act was a casualty of recession-era politics in which programs aimed at helping the poor are at heightened risk of being slashed from budgets.<sup>145</sup> Critics assailed the program for helping “illegal aliens” achieve the benefits of citizens, including working legally in the country.<sup>146</sup> Such efforts were criticized as taking jobs away from real Americans, who were suffering high rates of unemployment.<sup>147</sup>

Yet, in comparison to the success of the 2009 SCHIP reauthorization, the cost for the passage of the DREAM Act in the form of lost employment opportunities seems to be a fiscal bargain compared to the \$33 billion additional dollars allocated to the SCHIP program for

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145. See, e.g., Davey, *supra* note 12, at A22; Associated Press, *Schwarzenegger Details More Budget Cuts*, MSNBC (May 26, 2009), [http://www.msnbc.msn.com/id/30949433/ns/us\\_news-life/t/schwarzenegger-details-more-budget-cuts/#](http://www.msnbc.msn.com/id/30949433/ns/us_news-life/t/schwarzenegger-details-more-budget-cuts/#); Associated Press, *GOP Cuts Target Food Aid for Low-Income Families*, CBS NEWS (May 23, 2011), <http://www.cbsnews.com/stories/2011/05/23/politics/main20065537.html>.

146. See, e.g., Paul Sakuma, *DREAM Act Enables Fraud and Steals Jobs*, USA TODAY, July 11, 2011, at A6. This article quoted the statement of Rep. Lamar Smith (R-Texas) Chairman of the House Judiciary Committee in a letter to the editor: “Millions of unemployed Americans dream of going back to work, but the DREAM Act prevents Americans from getting jobs since millions of illegal immigrants will be eligible to work legally in the U.S.” *Id.* Recently, vocal opponents to the DREAM Act have attacked state legislative provisions of in-state tuition rates to undocumented immigrants, an approach that some states have enacted in a response to the demise of the federal DREAM Act. See Michael A. Olivas, *Lawmakers Gone Wild? College Residency and the Response to Professor Kobach*, 61 SMU L. REV. 99, 113 (2008). The debate in Maryland over in-state tuition rates for undocumented students prompted DREAM Act opponents to petition to get the so-called Maryland DREAM Act as a ballot measure. See Aaron C. Davis, *Md Voters to Decide Immigrant Tuition Law*, WASH. POST, July 8, 2011, at A1 (“Under the law, undocumented immigrants who can prove that they have attended Maryland high schools for at least three years and that their parents or guardians have begun paying taxes were to have been allowed to begin courses this fall at community colleges at in-state rates. The measure was approved in the closing hours of this year’s legislative session after years of failed attempts. Opponents of the immigrant tuition bill celebrated [the decision to put the legislation on the ballot], calling the news from the Maryland State Board of Elections a chance to turn back an expensive liberal ideology promoted by the Democratic-controlled legislature.”).

147. See, e.g., Sakuma, *supra* note 146, at A6.

2009 through 2013.<sup>148</sup> Although there are no credible estimates of the costs of these jobs being taken from Americans, the Congressional Budget Office estimated that, over ten years, the 2010 House version of the DREAM Act<sup>149</sup> would result in a \$1.7 billion *increase* in revenues.<sup>150</sup> Thus, despite this disparity in budgetary impact, the SCHIP reauthorization survived the recessionary pinch while the DREAM Act failed.

Rather, the critical difference between SCHIP success and DREAM Act failure is the second—and true—reason for the demise of the DREAM Act. As a measure targeted specifically to provide the privileges and benefits of lawful residency to immigrants who are unlawfully present in the United States, the DREAM Act faced harsh and hostile anti-immigrant trends.<sup>151</sup> Opponents of the DREAM Act ignored the purpose of the Act and discounted the character and potential of the intended beneficiaries of the legislation, deeming the program “amnesty” for lawbreakers.<sup>152</sup>

Importantly, like the main narrative in the SCHIP reauthorization debate, the DREAM Act is also about the future of America’s greatest resource: its children.<sup>153</sup> DREAM Act proponents and the dreamers themselves—i.e., those students who would have benefitted from the legislation—took to the streets and congressional hallways to lobby for their future.<sup>154</sup> Politicians argued that the children had no blame in coming to the United States illegally or remaining in unlaw-

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148. See discussion *supra* Part I.B. (discussing SCHIP costs).

149. H.R. 6497, 111th Cong. (2010).

150. See CONG. BUDGET OFFICE, COST ESTIMATE: H.R. 6497 DEVELOPMENT, RELIEF, AND EDUCATION FOR ALIEN MINORS ACT OF 2010 1 (2010), available at <http://www.cbo.gov/ftpdocs/120xx/doc12015/hr6497.pdf>.

151. See discussion *supra* Part II.B. and notes 143, 147.

152. See David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES, Dec. 18, 2010, <http://www.nytimes.com/2010/12/19/us/politics/19immig.html?scp=2&sq=%22dream%20act%22&st=cse>. Remarking on his “No” vote on the DREAM Act, Senator Jeff Sessions (R-Alabama) stated:

As part of this legislative session there has been no serious movement to do anything that would improve the grievous situation of illegality at our border . . . Leaders in Washington have not only tolerated lawlessness but, in fact, our policies have encouraged it. This bill is a law that at its fundamental core is a reward for illegal activity.

*Id.*

153. Opponents of the DREAM Act might counter that undocumented children are not part of America’s future but rather belong to their native countries’ communities. A key assertion in this Essay is that undocumented immigrant children who would be beneficiaries of the DREAM Act should be and are included in the community of children that constitutes the country’s greatest resource. As these children show promise and commitment to their individual success, they would contribute positively to the success of the country, and their contributions should be welcomed.

154. See *supra* discussion Part I.A.

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ful immigration status in the United States.<sup>155</sup> Impressive students, like Maricela Aguilar,<sup>156</sup> came forward to humanize the political debate, putting themselves in harm's way by inviting removal from the country after identifying themselves as undocumented.<sup>157</sup> In all of these venues and activities, DREAM Act proponents worked to emphasize the importance of its passage for the *children* that were directly affected by the legislation.

In the end, however, the narrative of the child needing protection as America's greatest resource could not overcome the power of the undocumented immigrant—or as she is more commonly known, the “illegal alien.”<sup>158</sup> Unlike the SCHIP reauthorization debates of 2009 in which focus could be soundly placed on the effects of the legislation for poor and modest-income children and away from the new benefits in the 2009 expansion of SCHIP to immigrant children and pregnant women, there was no overshadowing that the intended—and indeed only—beneficiaries of the DREAM Act were undocumented immigrants. Thus, in a twisted irony, one of the most marginalized, subordinated, and disenfranchised communities in the United States, that of

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155. See, e.g., Herszenhorn, *supra* note 152. Speaking from the Senate floor in an impassioned speech to his fellow senators urging passage of the DREAM Act, Senator Dick Durbin (D-Illinois) stated:

I want to make it clear to my colleagues, you won't get many chances in the United States Senate, in the course of your career, to face clear votes on the issue of justice . . . . Thousands of children in America who live in the shadows and dream of greatness . . . . They are children who have been raised in this country. They stand in the classrooms and pledge allegiance to our flag. They sing our 'Star-Spangled Banner' as our national anthem. They believe in their heart of hearts this is home. This is the only country they have ever known.

*Id.* (internal quotations omitted); see also Dick Durbin, *Passing the Dream Act*, [http://durbin.senate.gov/public/index.cfm/hot-topics?ContentRecord\\_id=43eaa136-a3de-4d72-bc1b-12c3000f0ae9](http://durbin.senate.gov/public/index.cfm/hot-topics?ContentRecord_id=43eaa136-a3de-4d72-bc1b-12c3000f0ae9) (last updated June 28, 2011).

156. See Preston, *False Dawn*, *supra* note 130, at A15.

157. *Id.*; Baharampour, *supra* note 127, at A3.

158. See *supra* note 8.

the undocumented immigrant,<sup>159</sup> wields an impressive ability to sway legislation.<sup>160</sup>

To be sure, the DREAM Act was no panacea for the plight of the undocumented immigrant in the United States. Eligibility requirements for the Act's benefits were daunting and out-of-reach for all but a small percentage of the undocumented immigrant population.<sup>161</sup> Professor Michael A. Olivas notes that in 2006, the population of en-

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159. See Olivares, *supra* note 8, at 162-63 ("Compared to U.S. citizens and other lawfully-present residents, undocumented immigrants receive few rights and benefits in this country. Although undocumented immigrants often make the journey to the United States in search of work, because of their precarious and vulnerable immigration status, they frequently do not have employment stability, do not receive mandated minimum wages, and do not benefit from other workplace laws designed to protect workers. Moreover, undocumented immigrants may have little or no understanding of the justice system or how they may qualify for legal assistance. To maintain their safety and security in this country, the undocumented population lives in the shadows of the larger society, hoping to remain undetected. Therefore, an undocumented person is less likely to understand her rights and benefits and less likely to pursue relief through the judicial system than a person with a lawful status.") (citations omitted).

160. One need only spend a brief amount of time perusing popular media sources to understand the environment surrounding topics of illegal immigration. Racist and xenophobic vitriol in the guise of nativism or, worse, patriotism is prevalent on television talk shows and news programs and on the Internet in media sources, blogs, and the anonymous comment sections commonly placed after such sources. Examples are too numerous to competently summarize, but a recent *Washington Post* article provides an exemplar of the phenomena. The story is about a young woman—mother to three children, including a four-week-old baby whom the mother was breastfeeding—who faced imminent removal from the United States back to Guatemala. Eli Saslow, *Amid New Guidelines, Va. Woman's Deportation Case Comes Down to the Last Minute*, WASH. POST, Sept. 25, 2011, [http://www.washingtonpost.com/national/amid-new-guidelines-va-womans-deportation-case-comes-down-to-the-last-minute/2011/09/15/gIQApFUAXK\\_story.html](http://www.washingtonpost.com/national/amid-new-guidelines-va-womans-deportation-case-comes-down-to-the-last-minute/2011/09/15/gIQApFUAXK_story.html). The woman, Ms. Paula Godoy, entered the United States illegally approximately ten years ago, worked cleaning homes, maintained a clean criminal record, paid taxes, and strived to be a good mother to her children, two of whom were United States citizens. *Id.* One day after publication, approximately 2,500 anonymous comments to the article were left on the Washington Post's website. Comments ranged in response to the article but many took the same tone of a person going by the name, desertdiva1: "I think many of us would gladly donate to a fund that ships them home without costing taxpayers a dime. Removing these unskilled third world immigrants who failed to assimilate does us all a favor. In 11 years she still hasn't bothered to learn English. Thanks but America can do so much better than people like Ms [sic] Godoy who's [sic] only achievement is spitting out anchor babies at a record clip." *Id.* (Sept. 25, 2011, 7:44 PM).

161. In the recently-introduced Senate version of the Dream Act, the eligibility requirements and limitations on potential beneficiaries are numerous and onerous:

(b) Requirements.-

(1) In general. Notwithstanding any other provision of law, the Secretary may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence on a conditional basis, an alien who is inadmissible or deportable from the United States or is in temporary protected status under section 244 of the Immigration and Nationality Act (8 U.S.C. § 1254a [(2006)]), if the alien demonstrates by a preponderance of the evidence that-

(A) the alien has been continuously physically present in the United States since the date that is 5 years before the date of the enactment of this Act;

(B) the alien was 15 years of age or younger on the date the alien initially entered the United States;

(C) the alien has been a person of good moral character since the date the alien initially entered the United States;

(D) subject to paragraph (2), the alien-

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rolled full- or part-time undocumented students that were potentially eligible for immigration relief under the terms of the DREAM Act was approximately 50,000 to 60,000 people.<sup>162</sup> Considering that the

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- (i) is not inadmissible under paragraph (2), (3), (6)(E), (6)(G), (8), (10)(A), (10)(C), or (10)(D) of section 212(a) of the Immigration and Nationality Act (8 U.S.C. § 1182(a) [(2006)]);
  - (ii) has not ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion; and
  - (iii) has not been convicted of-
    - (I) any offense under Federal or State law punishable by a maximum term of imprisonment of more than 1 year; or
    - (II) 3 or more offenses under Federal or State law, for which the alien was convicted on different dates for each of the 3 offenses and imprisoned for an aggregate of 90 days or more;
  - (E) the alien-
    - (i) has been admitted to an institution of higher education in the United States; or
    - (ii) has earned a high school diploma or obtained a general education development certificate in the United States; and
  - (F) the alien was 35 years of age or younger on the date of the enactment of this Act.

(3) Submission of biometric and biographic data. The Secretary may not grant permanent resident status on a conditional basis to an alien under this section unless the alien submits biometric and biographic data, in accordance with procedures established by the Secretary. The Secretary shall provide an alternative procedure for applicants who are unable to provide such biometric or biographic data because of a physical impairment.

(4) Background checks.-

(A) Requirement for background checks. The Secretary shall utilize biometric, biographic, and other data that the Secretary determines is appropriate-

- (i) to conduct security and law enforcement background checks of an alien seeking permanent resident status on a conditional basis under this section; and
- (ii) to determine whether there is any criminal, national security, or other factor that would render the alien ineligible for such status.

(B) Completion of background checks. The security and law enforcement background checks required by subparagraph (A) for an alien shall be completed, to the satisfaction of the Secretary, prior to the date the Secretary grants permanent resident status on a conditional basis to the alien.

(5) Medical examination. An alien applying for permanent resident status on a conditional basis under this section shall undergo a medical examination. The Secretary, with the concurrence of the Secretary of Health and Human Services, shall prescribe policies and procedures for the nature and timing of such examination.

(6) Military selective service. An alien applying for permanent resident status on a conditional basis under this section shall establish that the alien has registered under the Military Selective Service Act (50 U.S.C. App. 451 et seq. [(2006)]), if the alien is subject to such registration under that Act.

S. 952, 112th Cong. § 3 (2011). These initial eligibility requirements do not include the separate requirements that potential beneficiaries must meet to (1) achieve Lawful Permanent Resident immigration status and then, eventually, (2) qualify to naturalize. For example, section five of S. 952 addresses the process for beneficiaries of the DREAM Act to remove the conditional basis of their lawful permanent residency and includes requirements such as that the “alien has been a person of good moral character during the entire period of conditional permanent residence status” and the person has not “abandoned the alien’s residence in the United States.” *See id.* § 5(a)(1)(A), (C). The naturalization process also consists of numerous complicated requirements. *See, e.g., Path to U.S. Citizenship*, U.S. CITIZENSHIP & IMMIGR. SERVICES, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=86bd6811264a3210VgnVCM100000b92ca60aRCRD&vgnnextchannel=86bd6811264a3210VgnVCM100000b92ca60aRCRD> (last visited Oct. 29, 2011).

162. *See* Olivas, *The Political Economy*, *supra* note 116, at 1758 n.2 (“A 2006 Migration Policy Institute (MPI) study estimated that approximately 50,000 undocumented college students

undocumented population was estimated in March 2010 to be around 11.1 million people,<sup>163</sup> the effects of the DREAM Act would have amounted to a figurative blip in the immigration reform movement. Thus, the DREAM Act would not, in numeric terms, actually affect the future of many immigrants, nor would it amount to a large-scale grant of immigration relief for undocumented immigrants.

The demise of the DREAM Act, then, was about more than the number of undocumented immigrants who were allowed the benefits and privileges of lawful residence in the United States. In recession-era politics, when politicians search for scapegoats, the undocumented immigrant is an easy target. As undocumented immigrants are a politically voiceless population with no right to vote,<sup>164</sup> it was convenient for politicians and their constituents to lose “common sense”<sup>165</sup> in the DREAM Act debate.

The effects on immigrants, though, are devastating. Immigrant families are increasingly pushed into second-class status, which is ex-

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were enrolled, either full-time and part-time, and would be eligible for permanent status under the DREAM Act.”) (citing Jeanne Batalova & Michael Fix, *New Estimates of Unauthorized Youth Eligible for Legal Status Under the DREAM Act*, MIGRATION POL’Y INST., Oct. 2006, at 1, available at <http://www.migrationpolicy.org>). This number, however, does not, take into account the students’ eligibility for immigration relief pursuant to the numerous other requirements of the proposed legislation. Thus, although these students *could* be eligible for immigration relief, it is not certain that they *would* achieve relief under the DREAM Act’s stringent requirements. See *supra* note 159 and accompanying text.

163. JEFFREY S. PASSEL & D’VERA COHN, PEW HISPANIC CTR. UNAUTHORIZED IMMIGRANT POPULATION: NATIONAL AND STATE TRENDS, 2010, at 9 (2011).

164. See, e.g., Olivares, *supra* note 8, at 190, for a discussion on legislative funding priorities ignoring the service and access to justice needs of immigrant victims of domestic violence:

By not helping low-income immigrant domestic violence victims . . . policymakers easily ignore a largely voiceless and powerless population. Traditional academics, policymakers, lawyers and judges—who are still largely white and American-born—are not attuned to the plight of this community. Further, as foreign-born people, many of whom have unstable immigration status, [they] . . . have no political clout and often cannot vote. Thus, there is no individual benefit for policymakers to consider [their] fate . . . when determining legislative and funding priorities.

*Id.* (citation omitted). In the year leading up to the 2012 Presidential elections, Republicans vying for the party’s nomination criticize each other for not being strong *enough* against illegal immigration. In a September 22, 2011 Republican debate, Mitt Romney criticized Texas Governor Rick Perry for supporting Texas’s provision of in-state tuition benefits for undocumented students. See Perry Bacon, Jr., *Romney Attacks Perry on Immigration Comment*, WASH. POST, Sept. 23, 2011, [http://www.washingtonpost.com/politics/romney-attacks-perry-on-immigration-comment/2011/09/23/gIQAV1nYqK\\_story.html](http://www.washingtonpost.com/politics/romney-attacks-perry-on-immigration-comment/2011/09/23/gIQAV1nYqK_story.html). Perry defended the policy, stating: “If you say that we should not educate children that have come into our state for no other reason than they’ve been brought here by no fault of their own, I don’t think you have a heart.” *Id.* (internal quotations omitted). The next day at a conservative political rally, Romney responded, “I think if you’re opposed to illegal immigration, it doesn’t mean you don’t have a heart, it means you have a heart and a brain.” *Id.* Facing a backlash from opponents and politically conservative media, Perry backtracked. See Philip Rucker, *Rick Perry Says His Remarks on Immigration Were Inappropriate*, WASH. POST, Sept. 28, 2011, at A10.

165. See *supra* note 139 and accompanying text.



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acerbated if they are also people of color.<sup>166</sup> Facing struggles with language and cultural differences, immigrant families often live beyond the margins of United States society,<sup>167</sup> trying and hoping to succeed in this country. Without a legal and stable immigration status, an undocumented immigrant is unable to secure work authorization in the United States and cannot legally obtain employment.<sup>168</sup> Thus, higher-paying jobs typically elude undocumented immigrants,<sup>169</sup> many of whom come to this country in pursuit of better lives for them and their children. The DREAM Act would have provided this opportunity for the children of these undocumented immigrants—i.e., opportunities for stable immigration status *through* higher education or military service. In turn, these successful young people could help support their families.

Yet, the failure of the DREAM Act signals that even the most hard working, bright, and patriotic of immigrants are not welcome to share the benefits and privileges of lawful residence in the United States. For a young undocumented immigrant who had no choice but to come to this country and now knows no other home, what more can he do to achieve his American dream than do everything right?<sup>170</sup> In sum, even after years of academic success through high school,<sup>171</sup> col-

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166. Kimberlé Crenshaw authored a seminal work concerning the intersectionalities of marginalizing characteristics that affect women of color who are victims of domestic violence. See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991). Professor Crenshaw's thesis—that a person can experience subordinating experiences based on elements of her/his race, gender, immigration status, status as a domestic violence victim, etc. and that these elements intersect to create a heightened subordinating experience—is illustrative in understanding the experience of the undocumented immigrant living in the United States. See *id.* at 1249 (“Intersectional subordination . . . is frequently the consequence of the imposition of one burden that interacts with preexisting vulnerabilities to create yet another dimension of disempowerment.”). In this analysis, the undocumented immigrant living in the United States may experience a host of disempowering burdens that heighten the marginalizing experience: lack of English proficiency, poverty, lack of education and/or literacy, race, gender, religion, disenfranchisement, ignorance of the laws and justice system and role of police and law enforcement, etc.

167. See Olivares, *supra* note 8, at 162-63.

168. See Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324(a)-(b) (2006).

169. See Preston, *False Dawn*, *supra* note 130, at A15.

170. Amid the June 2010 protests to the controversial Arizona immigration bill, S. 1070, students seeking passage of the DREAM Act spoke of their predicament:

In school we learned that if you do everything right and live by the rules, that you'll be rewarded, that everything will pay off, that you can be whatever you want to be . . . .

We really believed that. We never felt different from other American kids, and now we want to start contributing to our country and make our country better.

Marjorie Valbrun, *Amid Arizona Immigration Protests, A New Generation Dreams of the DREAM Act*, WASH. POST, June 6, 2010, at B2 (quoting Lizbeth Mateo, 25, who came to the United States from Mexico at age 14).

171. See, e.g., David Montgomery, *A Rare Reprieve from Immigration Limbo; Indian Teen Illegally in U.S. Is Allowed to Pursue College in Only Home He's Known*, WASH. POST, Aug. 12,

lege,<sup>172</sup> or even after three years of law school,<sup>173</sup> the undocumented immigrant is back where he started. He, like most undocumented immigrants, is working (if at all) illegally and at low-paying jobs in the non-professional sector,<sup>174</sup> exacerbating the financial condition of immigrants in already distressing recessionary times.<sup>175</sup> This result ignores the important contributions these talented and loyal could-be-Americans would make to this country's workforce, social and political communities, and military.

### CONCLUSION

In times of financial distress, Americans of all economic, racial and cultural backgrounds suffer the consequences. Yet the experiences of Latino-American and immigrant families in the recession have been particularly harsh, with children suffering the greatest effects.<sup>176</sup> In response to the economic crisis and the burdens faced by families in need, legislators and presidents debated the best ways to help.

And help they did. Focusing on the needs of America's uninsured, and most specifically, children lacking health insurance, Congress finally passed a comprehensive reauthorization of SCHIP and sent it for President Obama's signature in 2009. Even though the 2009 SCHIP reauthorization included provisions allowing lawful permanent resident immigrant children and pregnant women insurance coverage, this attention to children carried the legislation past anti-immigrant efforts to thwart SCHIP reauthorization and expansion.

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2010, at A1 (describing story of Yves Gomes, a student who graduated with a 3.8 GPA and took Advanced Placement courses in high school in Maryland but faced deportation back to India, which he had left with his parents when he was fourteen months old).

172. See, e.g., Bahrampour, *supra* note 127, at A3 (regarding Ms. Aguilar, a nineteen-year-old student at Marquette University and Francisco Gutierrez, an eighteen-year-old Georgetown University student); Preston, *False Dawn*, *supra* note 130, at A15 (regarding Jose Variable, a nineteen-year-old student at Gateway Technical College); *Mariano's Story*, *supra* note 120.

173. See, e.g., *Prerna Lal*, *supra* note 120. ("Prerna Lal is a George Washington University law student who helped found DreamActivist, the immigrant youth-led DREAM Act organization.").

174. After the recent demise of the DREAM Act in the U.S. Senate, commentators discussed the effect on the intended beneficiaries:

A moment of truth . . . comes when the students graduate from college. Many excel academically, but without work authorization, they cannot be legally employed. Some immigrants with bachelor's degrees end up busing restaurant dishes and cleaning offices, falling back on the jobs of their less educated parents, who often struggled to put them through college.

Preston, *False Dawn*, *supra* note 130, at A15.

175. See *supra* Introduction.

176. See LOPEZ & VELASCO, *supra* note 6.

*SCHIP Success and DREAM Act Failure*

Unfortunately, Congress was not willing to invest in and protect all children. Young undocumented immigrants, brought to the United States as children and through no choice of their own, stood to gain entry to the American dream through the passage of the DREAM Act. Although the focus of the DREAM Act is squarely on helping children and protecting their future well-being, their immigrant status—being an undocumented immigrant, or more commonly known as, an “illegal alien”—was ultimately too much to overcome. As immigration reform, and in particular, humane reform that encompasses the needs of the immigrant community continues to elude the United States, the DREAM Act’s future is decidedly unclear.

Instead, the case can easily be made for passage of the DREAM Act. Incorporating the best and brightest young minds into the American workforce and supporting the American military should be a priority in times of national economic distress and war. Clearing the path to United States citizenship for DREAM Act beneficiaries will benefit the United States. Congress should act quickly to pass the DREAM Act and restore the promise of the American dream to our greatest resource and the future of our country, our children.



# Dark Secrets: Obedience Training, Rigid Physical Violence, Black Parenting, and Reassessing the Origins of Instability in the Black Family Through a Re-Reading of Fox Butterfield’s *All God’s Children*

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*“Your observation of a situation—no matter how remote you believe yourself to be—makes you a co-creative partner of the experience.”<sup>1</sup>*

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1. ESTHER HICKS & JERRY HICKS, *THE VORTEX: WHERE THE LAW OF ATTRACTION ASSEMBLES ALL COOPERATIVE RELATIONSHIPS* 6 (2009).

“[T]he observer, through observation, can create the subjective experience of hopelessness. Unfortunately . . . the observer fuses with, and experientially becomes, this hopelessness and thinks that is who he/she is.”<sup>2</sup>

## INTRODUCTION

Since slavery, most black families have suffered instability<sup>3</sup> because, even if two parents were present,<sup>4</sup> they relied on obedience training and rigid physical violence as an appropriate childrearing practice.<sup>5</sup> Traditionally, it has been *de rigueur* to point simply to slavery’s soul-murdering practices and to Jim Crow’s neo-slavery violence to explain such instability.<sup>6</sup> Traditionally, instability has meant that

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2. STEPHEN WOLINSKY, QUANTUM CONSCIOUSNESS: THE GUIDE TO EXPERIENCING QUANTUM PSYCHOLOGY 90 (1993); see also ARNOLD MINDELL, QUANTUM MIND: THE EDGE BETWEEN PHYSICS AND PSYCHOLOGY 27-28 (2000) (“The observer does everything possible to remain objective and keeps feelings out of the picture; participating in the world being observed is deemed to be ‘bad’ science.”).

3. See generally E. FRANKLIN FRAZIER, THE NEGRO FAMILY IN THE UNITED STATES (1939) (explaining that due to the inability of blacks to legally marry, slavery caused black family instability because parents were separated from children, because parents could not bond with their child, thus resulting in black females becoming the head of household, and because, upon relocating to the north, black rural folks created disorganized families, which resulted in spiraling rates of crime, juvenile delinquency, and lower educational outcomes); OFFICE OF POLICY PLANNING & RESEARCH, U.S. DEP’T. OF LABOR, THE MOYNIHAN REPORT (1965), available at <http://www.blackpast.org/?q=primary/moynihan-report-1965> (explaining that slavery and racial oppression caused historical and modern black family instability and problems including a “tangle of pathology”). But cf. Erol Ricketts, *The Origins of Black Female-Headed Families*, 12 FOCUS 32, 34 (1989), available at <http://irp.wisc.edu/publications/focus/pdfs/foc121e.pdf> (“[T]he argument that current levels of female-headed families among blacks are due directly to the cultural legacy of slavery . . . [is] not supported by the data.”).

4. Ricketts, *supra* note 3, at 32. Based on new data, Ricketts writes:

In light of the continued debate about the origins of family-formation problems among blacks, including female-headed families, it is useful to examine the available historical data covering the decennial years from 1890 to 1980 . . . . The data show, contrary to widely held beliefs, that through 1960, rates of marriage for both black and white women were lowest at the end of the 1800s and peaked in 1950 for blacks and 1960 for whites. Furthermore it is dramatically clear that black females married at higher rates than white females of native percentage until 1950.

*Id.* Thus, Ricketts’s observations suggest that blacks were marrying, and perhaps two parents more than likely were present in the home. And his observations also suggest that single-black parenting coexisted with traditional notions of the conjugal family, in which two black parents raised, nurtured, and educated their children.

5. See MURRAY STRAUS WITH DENISE A. DONNELLY, BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECTS ON CHILDREN 117 (2001) (explaining that black parents’ use of physical beatings is part of the black culture); cf. June Ellis, *The Child in West African Society*, in THE WEST AFRICAN FAMILIES IN BRITAIN: A MEETING OF TWO CULTURES 39, 48 (June Ellis ed., 1978) (“[P]unishment is a very important part of caring and a necessary part of good parenthood.”).

6. Ricketts, *supra* note 3, at 32 (“[F]amily instability among blacks was the root cause of the social and economic problems suffered by blacks. Family patterns of blacks were attributed to slavery and racial oppression, which focused on the humbling the black male.”); cf. MARIE JENKINS SCHWARTZ, BORN IN BONDAGE: GROWING UP ENSLAVED IN THE ANTEBELLUM SOUTH

black families have only one parent, principally the mother.<sup>7</sup> And while that traditional definition can explain inconsistency in family structure and children's outcomes,<sup>8</sup> instability ought to have a functional definition,<sup>9</sup> which would then require us to focus on whether a single- or two-parent family can meet its children's best interests and welfare.<sup>10</sup> By making this inquiry, we must examine how issues like poverty, multiple children, poor wages, school dropouts, criminality, depression, intimate partner violence, child maltreatment, alcoholism, rage, and resentment<sup>11</sup> limit a parent's ability to meet her moral, legal,

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77 (2000). In an extreme but not necessarily inaccurate explanation due more than likely to post-traumatic stress disorder, "Josephine Bacchus, who had been enslaved in South Carolina, blamed her inability to carry a child to term in adulthood to her lack of mothering in childhood. She had been a small girl when her mother died, and Josephine attributed her lifetime of poor health to that cause." *Id.*

7. See, e.g., Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 *FAM. L.Q.* 157, 160 (2011) ("Single parenthood is an important risk factor for poverty."); *Bad News from California: The Vaunted Latino Family is Coming to Resemble the Black Family*, *ECONOMIST*, Mar. 19, 2008, available at [http://www.economist.com/node/10880945?story\\_id=10880945](http://www.economist.com/node/10880945?story_id=10880945) ("The Latino family is not in such a dire state as the black family, where 71% of children are born to single mothers. Yet the gap appears to be closing. In 1995 the unmarried teenage birth rate for Latinas was 20% lower than the rate for blacks. It is now 12% higher."); Bobbi Bowman, *The (Poor) State of Black Families*, *ROOT* (Mar. 2, 2010, 6:57 AM), available at <http://www.theroot.com/print/39827> ("No surprise then that slightly more than half of black kids live with only one parent and that's overwhelmingly with their mother. A home headed by a single mom often equals an economically poor home."); *Id.* ("Nearly half of young black children living with their mom are poor. 'They are going to start out in poverty.'"); *Poverty in the United States*, *NAT'L POVERTY CENTER*, available at <http://www.npc.umich.edu/poverty> (last visited Feb. 15, 2012) ("Poverty rates are highest for families headed by single women, particularly if they are black or Hispanic.").

8. Cf. BARBARA SCHNEIDER ET AL., *FAMILY MATTERS: FAMILY STRUCTURE AND CHILD OUTCOMES 1* (2005), available at <http://acma.me/writing/docs/CurrentFamilyStructure.pdf>. ("One fundamental characteristic of the family that has significant and sustaining effects on children is its structure—that is, the number of parents and their relationships to the children in the household. A family structure can constrain the availability of economic and social resources such as parents' ability to spend time with their child, be involved in educational activities, and expend monetary resources that can promote positive educational outcomes and well-being. Research has consistently shown that family structure can facilitate or limit the ways in which parents are able to positively influence the future outcomes of their children.")

9. See, e.g., Jerold Heiss, *On the Transmission of Marital Instability in Black Families*, 37 *AM. SOC. REV.* 82, 90 (1972) ("[M]any black women without spouses manage to provide good homes for their children.").

10. See, e.g., *People ex rel. T.G.*, 578 N.W.2d 921, 922 (S.D. 1998) (involving a two-parent family, in which the mother had experienced early childhood trauma and in which the father was an alcoholic, and the mother refused to protect their child from the father's pattern and practice of sexual abuse).

11. See, e.g., *id.* In this case, this mother failed to protect her child from sexual abuse by her biological father, and given her own childhood history of severe maltreatment, we must at the very least ask if her childhood contributed causally to her inability to protect her child and thus to her violent abuse of her child by proxy. Here's her history:

[T]hirty-year-old Mother is the product of an abusive childhood. She lived with her alcoholic mother until she was four years old. She recalls being thrown, starved and locked in cupboards by her mother, and abused by her mother's boyfriends. Her mother "sold" her to adoptive parents for \$1500 and these parents began sexually abus-

and educational duties to her children.<sup>12</sup> Accordingly, for example, if one or both parents abuse alcohol, then they invariably neglect the children's welfare interests, suggesting that the family, as a unit, malfunctions and suffers instability.<sup>13</sup> However, do these issues follow logically and inexorably from slavery and Jim Crow?

For some sociologists, slavery and Jim Crow directly caused the traditional instability of the black family and related issues.<sup>14</sup> Slavery and Jim Crow, they assert, disorganized and destabilized the black family by wresting it from its cultural moorings.<sup>15</sup> As a result, these

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ing her at age seven. Mother gave birth to her first child when she was thirteen. The child, fathered by adoptive father, was placed for adoption. Mother was placed in a residential home until she graduated from high school after completing a special education curriculum. When she was eighteen, she gave birth to her second child, the product of a rape. The baby died the day after birth.

*Id.*; see also Heiss, *supra* note 9, at 83 (listing the typical but not exhaustive issues that researchers believe contribute to broken homes in the black and white communities, i.e., mental illness, drug addiction, crimes, lower academic achievement, delinquency, social deviancy, poor discipline, and effects of racism).

12. See, e.g., *Hensler v. City of Davenport*, 790 N.W.2d 569, 575 (Iowa 2010). The opinion states:

On July 21, 1999, Davenport City Council adopted ordinance 9.56, entitled Parental Responsibility . . . . It is the duty of the parent of a minor child or minor children to exercise sufficient control over a said minor(s) to prevent the minor(s) from committing any unlawful act in violation of federal law, state law or city ordinance. Any occurrence is a breach of this duty.

*Id.* (internal quotation marks omitted).

13. See, e.g., NSW DEP'T OF CMTY. SERV., CTR. FOR PARENTING & RESEARCH, PARENTAL ALCOHOL MISUSE AND THE IMPACT ON CHILDREN 1 (2006), available at [www.community.nsw.gov.au/docswr/\\_assets/main/documents/researchnotes\\_alcohol\\_misuse.pdf](http://www.community.nsw.gov.au/docswr/_assets/main/documents/researchnotes_alcohol_misuse.pdf) ("There is no clear evidence that maternal alcohol misuse has a greater or lesser impact on children than paternal alcohol misuse. However, children of mothers who misuse alcohol are more likely to be exposed to a variety of risks, for example maternal depression which may result in emotional unavailability to the child."); Cathy Spatz Widom & Susanne Hiller-Sturmhofel, *Alcohol Abuse as a Risk Factor for and Consequence of Child Abuse*, 25 ALCOHOL RES. & HEALTH 52, 52 (2001), available at [pubs.niaaa.nih.gov/publications/arh25-1/52-57.pdf](http://pubs.niaaa.nih.gov/publications/arh25-1/52-57.pdf) ("Child abuse is one of the many types of violence associated with alcohol use and abuse, either as a consequence or as a causative factor. For example, parental alcohol abuse may contribute to the abusive treatment of children. Furthermore, people who have been abused as children may be at increased risk for developing alcohol abuse as adults."); Lloyd deMause, *The Origins of War in Child Abuse: The Psychology and Neurobiology of Violence*, available at [http://www.psychohistory.com/originsofwar/03\\_psychology\\_neurobiology.html](http://www.psychohistory.com/originsofwar/03_psychology_neurobiology.html) (last visited Feb. 16, 2012) ("Severe maternal neglect can be seen in most mothers who are post-partum depressed or who drink alcohol daily or smoke a lot or are maritally dissatisfied or who are lone caretakers . . .").

14. See, e.g., Nathan Hare, *A Look Back at E. Franklin Frazier*, 25 NEGRO DIGEST 4, 5 (1976), available at <http://books.google.com/books> (enter "Nathan Hare, A look Back at E. Franklin Frazier" into the search field) (arguing that based on E. Franklin Frazier's seminal work, "distortions and pathology in the Black family, as in all aspects of Black society, is mainly a product of slavery and ensuing racism – or racial oppression, in the language of today").

15. See also FRAZIER, *supra* note 3, at 3-16 (arguing that black slaves had increasingly fading memories of their African heritage, especially because white masters deliberately denied them a community where they at the very least shared a common language). See generally ABRAM KARDINER & LIONEL OVESEY, *THE MARK OF OPPRESSION: EXPLORATIONS IN THE PERSONALITY OF THE AMERICAN NEGRO* 38-41 (1951) (making the same argument that Ameri-



rudderless black families have for generations drifted through the high, rough seas of instability, which have become indelibly marked on the *black* psyche and consciousness.<sup>16</sup> Adrift and bewildered, blacks now suffer from a deep cultural decay, if not pathology, so that their personal experiences and social realities become self-referential acts that condemn adults and children to intergenerational ignorance, poverty, violence, and hopelessness.<sup>17</sup> In short, while these blacks have internalized beliefs and practices that have become self-annihilating, we cannot uncouple such beliefs and practices from the legacy of slavery and Jim Crow. In sum, they would argue that America's

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can slavery had stripped blacks of literally any viable vestige of West African culture and heritage, leaving them without the wherewithal to overcome their cultural challenges).

16. See generally DOUGLASS G. GLASGOW, *THE BLACK UNDERCLASS: POVERTY, UNEMPLOYMENT AND ENTRAPMENT OF GHETTO YOUTH* viii (1980) ("One purpose of this book is to show what institutional rejection can do to individual aspirations. Among other things, . . . [I] examine the lives of inner-city young men through their perceptions of their experiences.").

17. See, e.g., Reginald Leamon Robinson, *Poverty, the Underclass, and the Role of Race Consciousness: A New Age Critique of Black Wealth/White Wealth and American Apartheid*, 34 IND. L. REV. 1377, 1386 (2001) [hereinafter *Poverty*]. In *Poverty*, I argue against a purely structural critique in my review of *American Apartheid* and *Black Wealth/White Wealth* because such traditional, albeit conservative, sociological frameworks like "culture of poverty" and "learned helplessness" diminish the impact of expressing a human being's natural, in-born creative and co-creative powers by simply viewing her personal experiences and social realities through race consciousness. From a different point of view, these frameworks argue that blacks, especially those who have suffered racially charged childhood maltreatment, i.e., racisms demand that you be a perfect black male child, created mostly by default of a world, which is filled with poverty, violence, and dysfunction. *Id.*; see FOX BUTTERFIELD, *ALL GOD'S CHILDREN: THE BOSKET FAMILY AND THE AMERICAN TRADITION OF VIOLENCE* 207-15 (1995) (stating that Willie James rejected counseling at the Henry Street Settlement, where he could have received a meager \$2.35 per hour, where he could have been off the streets, and where he was wanted by Minerva Woullard and her husband for adoption, so that he could spend time with his cousin, Herman, robbing sleeping passengers on the subway and killing them if needed). Specifically, in *Poverty*, I argued:

By ignoring the degree to which race consciousness works intimately and interdependently with social structures, studies by sociologists like Melvin Oliver, Thomas Shapiro, Douglas Massey, and Nancy Denton miss the ultimate point. By focusing only on social structures as explanatory variables (e.g., white structural racism) for the persistence of poverty, we become fixated on raw data. We spend lots of time and money describing a world that could never exist without us. We may even look to political economy and the internationalization of domestic economies to explain structural shifts that deposit the [dis]respected poor permanently into the underclass. Unfortunately, these data, descriptions, and theories rarely if ever uncover profoundly new factors that might better explain why poverty persists. Any explanation, data, or description that ignores human agency and race consciousness must fail.

*Poverty*, *supra*, at 1386 (citations omitted); see also JANE ROBERTS, *THE NATURE OF PERSONAL REALITY: SPECIFIC, PRACTICAL TECHNIQUES FOR SOLVING EVERYDAY PROBLEMS AND ENRICHING THE LIFE YOU KNOW* 22 (1994) ("You are in physical existence to learn and understand that our energy, translated into feelings, thoughts and emotions, causes *all* experience. *There are no exceptions.*") (emphasis added).

oppressive structural forces like slavery have caused instability in the black family.<sup>18</sup>

Other sociologists or scholars disagree. They point to obvious examples in which intact black families meet their children's needs and best interests<sup>19</sup> and are not contaminated by drugs, violence, illegitimacy, poverty, and disorganization.<sup>20</sup> Then, they also argue that the legacy of slavery and Jim Crow lacks the ongoing, inherent power to cause the breakdown of the black family.<sup>21</sup> Accordingly, the instability of the black family emanated less from ephemeral white racism and more from far more concrete childrearing practices like child maltreatment, and unfortunately few legal or race scholars have acquired an insight into the impact of childhood maltreatment and its power to destabilize interpersonal relationships.<sup>22</sup> And while these scholars ac-

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18. See, e.g., JAMES T. PATTERSON, FREEDOM IS NOT ENOUGH: THE MOYNIHAN REPORT AND AMERICA'S STRUGGLE OVER BLACK FAMILY LIFE—FROM LBJ TO OBAMA 40 (2010). Whitney Young argued that the black family's disorganization had long history roots: "Slavery, he wrote, had promoted 'promiscuous breeding.' Even after emancipation . . . 'the composition of the Negro family continued to be such that the father, if identified, had no established role, and the Negro male, his manhood weakened, suffered economically and psychologically.'" *Id.* Like Young, Charles Silberman saw structural forces like oppression and discrimination as the root cause of the black family's disorganization, i.e., instability, and he argued:

With no history of stable families, no knowledge even of what stability might mean, huge numbers of Negro men took to the roads as soon as freedom was proclaimed. . . .

Thus there developed a pattern of drifting from place to place and job to job and woman to woman that has persisted (in lesser degree, of course) to the present day.

*Id.* at 41.

19. See generally W.E.B. DU BOIS, THE PHILADELPHIA NEGRO (1889) (arguing that in Ward Seven, three-fourths of black families were both intact and functioning).

20. See, e.g., Vicki L. Lamb et al., *Trends in African American Child Well-Being, 1985-2001*, in AFRICAN AMERICAN FAMILY LIFE: ECOLOGICAL AND CULTURAL DIVERSITY 45, 52 (Vonnice C. McLoyd et al. eds., 2005). Even though African American children's level of material well-being lags white Americans, they:

[S]how greater improvement in material well-being, as compared with the trend for all children, in that the African American children's level of material well-being in 2001 is 22% greater than in 1985, whereas the national trend improved 11%. The African American improvements are due to the reductions in child poverty rates (from 36% in 1985 to 27% in 2001) and increases in rates of secure parental employment (from 48% to 65%) and median family income (from \$25,281 in 1987 to \$30,339 in 2001, calculated in 2001 dollars).

*Id.*

21. See PATTERSON, *supra* note 18, at 147. Glenn Loury, a conservative who became Harvard's first black economist to earn tenure, argued that not white racism but the "societal disorganization among poor blacks, the lagging academic performance of black students, the disturbingly high rate of black-on-black crime, and the alarming increase in early unwed pregnancies among blacks now loom as the primary obstacles to black progress." *Id.* (citing Glenn Loury, *A New American Dilemma*, NEW REPUBLIC, Dec. 31, 1984, at 14-18).

22. See, e.g., Jessica H. Daniel et al., *Child Abuse and Accidents in Black Families: A Controlled Comparative Study*, 53 AM. J. ORTHOPSYCHIATRY 645, 653 (1983), available at <http://www.elinewberger.com/articles/archive/childabuse-research/abuseaccidents.html> ("Responsibility for child abuse in the black family resides as much in the society as in the relationships among family members."); Matthew Wickert, *African-American Studies: Black Families Suffer More*

knowledge the impact of slavery and Jim Crow, they focus on the impact of personality disorders and pathological culture<sup>23</sup> on the prevalence of child abuse (e.g., emotional neglect) on black family instability.

Regardless, neither group of scholars has explored the etiology of disorders and pathologies, nor how it impacts black family instability, which suggests that radical, liberal, and conservative approaches lack completeness<sup>24</sup> because they too have not linked black family instability with black parenting styles, obedience training, and rigid physical violence. This etiology predates slavery and Jim Crow because West Africans,<sup>25</sup> including other cultures around the world,<sup>26</sup> were—and re-

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*Instability*, YAHOO! VOICES (Dec. 18, 2007), available at [http://www.associatedcontent.com/article/489005/africanamerican\\_studies\\_black\\_families.html?cat=25](http://www.associatedcontent.com/article/489005/africanamerican_studies_black_families.html?cat=25). Wickert faults slavery for the instability of the black family, the increased role of the mother, and the marginalized role of the father. *Id.* Wickert also argues for a restoration of “yesterday’s moral climate,” a proxy for old school parenting, under which parents enforce the strictest obedience training, the breach of which led nearly immediately to rigid physical discipline. *Id.* However, Wickert’s argument would actually create more instability, mental health issues, and heightened rage and resentment among black children. See Jeana R. Bracey, *Socializing Race: Parental Beliefs and Practices in Two African American Families* 109 (2010) (unpublished Ph.D. Dissertation, University of Illinois, Champaign-Urbana), available at [http://www.ideals.illinois.edu/bitstream/handle/2142/18348/Bracey\\_Jeana.pdf?sequence=1](http://www.ideals.illinois.edu/bitstream/handle/2142/18348/Bracey_Jeana.pdf?sequence=1) (“Speaking for herself and her husband, Mrs. Samson acknowledged that spanking was used as a last resort technique. She stated, ‘if he can snap out of it himself, that’s fine, that’s best. But if he just continues to act you-know-what, then we have to do something to get him out of it.’ Mr. Samson added, ‘Immediately.’”).

23. See, e.g., KENNETH B. CLARK, *DARK GHETTO: DILEMMAS OF SOCIAL POWER* 70-74 (1965) (discussing psychological issues like poor self-esteem as the root of hyper-masculinity of black males); Orlando Patterson, *Blacklash: The Crisis of Gender Relations Among African Americans*, 62 *TRANSITION* 4, 16 (1993) (discussing the antimaternal need of young black men who pose or exaggerate their masculinity, so that they can expurgate the annihilation of their male identity).

24. Cf. DONNA L. FRANKLIN, *ENSURING INEQUALITY: THE STRUCTURAL TRANSFORMATION OF THE AFRICAN-AMERICAN FAMILY* xxiv (1997) (“These rival explanations of differences in family structure among blacks are not so much wrong as incomplete. The arguments blaming ‘slavery only,’ ‘migration only,’ and the ‘male marriageable pool,’ or the independent investigation of adolescent childbearing among African-Americans are insufficient to explain much of the variance in family structure between whites and blacks.”).

25. See Delores E. Smith & Gail Mosby, *Jamaican Child-Rearing Practices: The Role of Corporal Punishment*, 38 *ADOLESCENCE* 369, 373 (2003) (“The etiology of such harsh disciplinary practices in the Caribbean has been pondered. Although many arguments have been forwarded, the most pervasive and often cited explanations point back to heritage, history, tradition, and socialization. Several authors have expressed the view that the extreme authoritarian style, along with the excessive discipline meted out to children, stems from the region’s West African heritage combined with learned behavior, specifically from the brutality of slavery. These dynamics are bolstered by the religious sanction of “saving the rod and spoiling the child.”); see also JUDITH TIMYAN, *THE CULTURAL ASPECTS OF PSYCHOSOCIAL DEVELOPMENT: AN EXAMINATION OF WEST AFRICAN CHILDBEARING PRACTICES* 18 (1988) (“In West African societies a remarkable emphasis is placed on learning to be obedient and responsible . . . . In a Ghanaian study, most parents interviewed equated “bringing up a child” with “control and rigid discipline.” . . . The child is taught at a very young age to do exactly as he is told without asking for an explanation.”); Ellis, *supra* note 5, at 49 (“The strictness of traditional upbringing has

main—deeply committed to obedience training and rigid physical violence, which at the very least breaks the child’s will.<sup>27</sup> Even if obedience training and rigid physical violence were not an indispensable tool for black children’s survival,<sup>28</sup> blacks generally and culturally would still believe that obedience training and rigid violence are interwoven and positive approaches to childrearing,<sup>29</sup> especially if they had suffered obedience training and rigid physical violence as children.<sup>30</sup> Unfortunately, some psychologists and sociologists argue that even

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already been mentioned and it is generally accepted that punishment is a very important part of caring and a necessary part of good parenthood . . . . [A] substantial number of these same Ga adolescents when asked what they *liked* about their parents, specifically mentioned punishment: “my father punishes me to be good”; “she insults me . . . when I am bad.” . . . The kind of reasons [these very same Ga adolescents offered for why they’d raise their children within the strictest traditions] were, “Because I want my child to be more respectful than I am. I want my child to work harder than I do and help me more than I help my parents.” These views turn on the idea that a person is not “naturally” good and that, to help him to be good, severity of training is necessary.”); Austin J. Shelton, *Igbo Child-Raising, Eldership, and Dependence: Further Notes for Gerontologists and Others*, 8 GERONTOLOGIST 236, 237 (1968) (“The Igbo child nevertheless is at the very bottom of the heap in the living social structure, yet he is potentially important.”); *id.* at 240 (“The individual [especially the child] must understand his relationship to the society of men, of ancestors, and even of the gods, and behave accordingly, or he will suffer.”).

26. See, e.g., Adam J. Zolotor & Megan E. Puzia, *Bans Against Corporal Punishment: A Systematic Review of the Laws, Changes in Attitudes, and Behaviours*, 19 CHILD ABUSE REV. 229, 229 (2010) (explaining the pervasiveness of corporal punishment around the world); see also Emily M. Douglas, *Familial Violence Socialization in Childhood and Later Life Approval of Corporal Punishment: A Cross-Cultural Perspective*, 76 AM. J. ORTHOPSYCHIATRY 23, 23 (2006) (assessing concepts of corporal punishment across cultures).

27. See ALICE MILLER, FOR YOUR OWN GOOD: HIDDEN CRUELTY IN CHILD-REARING AND THE ROOTS OF VIOLENCE 42 (Hildegard Hannum & Hunter Hannum trans., 2002) [hereinafter MILLER, FOR YOUR OWN GOOD] (“[O]bedience as submission of the will to the legitimate will of another person.”).

28. See STRAUS WITH DONNELLY, *supra* note 5, at 193-215 (pointing out that child physical discipline is not indispensable to getting behavioral results because non-corporal punishment approaches also yield similar and perhaps sustainable positive outcomes in a child’s behavior).

29. See, e.g., Lisa C. Jones, *Why Are We Beating Our Children? An Upsurge in Child Abuse Cases Raises New Questions*, EBONY, Mar. 1993, at 80, available at [http://findarticles.com/pl/articles/mi\\_m1077/is\\_n5\\_v48/ai\\_13437203](http://findarticles.com/pl/articles/mi_m1077/is_n5_v48/ai_13437203). According to Dr. James P. Comer, a child psychiatrist at the Yale Child Study Center and co-author of *Raising Black Children*, “[d]uring slavery and other repressive periods in this country, Blacks felt a need to control kids, hoping to prevent them from acting up or getting out of place.” *Id.* He also stated: “This child-rearing practice has persisted over time to the extent that some Black parents still believe that they can ‘beat the badness out of their kids.’” *Id.*; see also Bracey, *supra* note 22, at 109 (“The Samsons acknowledged that spanking was an accepted family practice, but also considered it a valued cultural childrearing practice used particularly by working-class African Americans.”).

30. See Robert L. Hampton & Richard J. Gelles, *A Profile of Violence Toward Black Children*, in BLACK FAMILY VIOLENCE: CURRENT RESEARCH AND THEORY 21, 33 (Robert L. Hampton ed., 1991) (“Our data clearly indicate that either experiencing violence as a teen or witnessing violence in the family of orientation is significantly associated with violence in the family of procreation.”); cf. STRAUS WITH DONNELLY, *supra* note 5, at 189 (“[Injurious practices that are part of traditional cultures] apply to powerless segments of the society, such as footbinding of women in China or genital mutilation of girls in much of Northeast Africa”). “Mutilation of female genitals is an important example because, like spanking, it is defended most by its victims.” *Id.*

mild spanking may have long-term impacts on a child's development and personality.<sup>31</sup> If so, what impact does obedience training and rigid physical violence have on black children, especially males, and to what extent, if any, can this training and violence cause black family instability? For example, does it co-create poor or weak attachments between mothers and sons, and if so, do the results of such low trust and weak intimacy make stable marriages or cohabitation more difficult for blacks?

In this Article, I attempt to address these questions on the etiology of black family instability, and I do so principally through a re-reading of Fox Butterfield's *All God's Children*, which in effect argues that slavery, racism, urbanization, and an inherited "impulsiveness" gene birthed Willie James Bosket ("Willie James"), a violent, juvenile killer, into our world.<sup>32</sup> While I acknowledge that slavery and racism impacted the black family's stability,<sup>33</sup> I reject Butterfield's premise. Rather, I posit that Willie James had been soul-murdered by his mother, Laura, principally not only because she brutally beat him, but also because she refused to emotionally nurture him. In effect, Willie

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31. See Jones, *supra* note 29, at 80 ("Dr. Comer, who believes constant whippings tend to crush a child's capacity for creativity and assertiveness, agrees. '[I]f you spank when you're out of control, you shouldn't be surprised when your child hits someone at school or on the playground. . . . They got it from you.');" cf. Smith & Mosby, *supra* note 25, at 369-81 (2003) ("Although there is no research specifically showing a causal link between problem behaviors and emotional well-being in Jamaica, the popular assumption is that the increase in antisocial behaviors in that society emanates from an impaired sense of self-worth and psychological maladjustment among youth.").

32. See BUTTERFIELD, *supra* note 17, at 119. Shut out of jobs in the northern industrial economy, isolated by discrimination, idled by high unemployment, stunted by bad schools, and rendered insecure by unsafe neighborhoods, a black man's impulsiveness became a catalyst for trouble. On this point, Butterfield argued:

In these desperate conditions, Southern-born honor found a new spawning ground. Honor became even more dangerous when combined with poverty, racism, and big-city slums. In a world with so little opportunity for young black men, respect as one thing they could aspire to. "The significance of a jostle, a slightly derogatory remark, or the appearance of a weapon in the hands of an adversary" means something to poor blacks that it does not to the middle and upper classes, wrote the criminologists Marvin Wolfgang and Franco Ferracuti in a study of urban homicide. "A male is usually expected to defend the name and honor of his mother, the virtue of womanhood . . . and to accept no derogation about his race, his age or his masculinity."

*Id.* For Butch and perhaps later for Willie James, they had a "sensitivity to insults and threats [that] vibrated like a tuning fork." *Id.* If so, Butterfield argues by implication that neither of these "bad asses" could avoid the impulse to hurt, traumatize, or murder any more than a tuning fork could resist responding to a matched stimulus because, given the foregoing social factors, they were bound not by choice but by nature to become killers. *Id.*

33. See generally Heather Andrea Williams, *How Slavery Affected African American Families*, TEACHERSERVE, available at <http://www.nationalhumanitiescenter.org/tserve/freedom/1609-1865/essays/aafamilies.htm> (last visited Feb. 16, 2012) (describing how slavery affected African-American families).

James suffered from “Reactive Attachment Disorder,”<sup>34</sup> thus over time revealing the psychopathic results of his early childhood maltreatment. Such maltreatment is the *dark secret* that explains the present-day, ongoing instability of the black family. Therefore, it is my thesis that Butterfield fails to explain the advent of Willie James because: (1) Butterfield mistakenly links Willie James’ violence to working class “honor codes” and killings; (2) Butterfield almost completely discounts the legacy of West African child-rearing practices of obedience training and rigid physical violence, which survived slavery; (3) Butterfield, like other race scholars or writers, is loathed to find fault with black parents<sup>35</sup> who have been the first people to violently traumatize their children;<sup>36</sup> and (4) Butterfield, as other writers, does not account for the impact of obedience training and rigid physical violence including emotional neglect, on children’s personalities, on family cohesiveness and stability, and social violence.<sup>37</sup>

Part I critically presents Butterfield’s accounts of why Willie James became a violent criminal at a very young age. Part II. explores the legacy of West African child-rearing practices and the role those practices played during slavery, Jim Crow, and today. Part III considers some of the critical arguments about black family instability, all in the hopes of exposing the degree to which such debates precluded any indictment of black parents’ obedience training. Part IV applies Alice Miller’s “poisonous pedagogy” to *All God’s Children*, which reveals

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34. See generally KEN MAGID & CAROLE A. MCKELVEY, *HIGH RISK: CHILDREN WITHOUT A CONSCIENCE* 26 (1988) (“At the core of the unattached is a deep-seated rage, far beyond normal anger. This rage is suppressed in their psyche. Now we all have some degree of rage, but the rage of psychopaths is that born of unfulfilled needs as infants. Incomprehensible pain is forever locked in their souls, because of the abandonment they felt as infants.”).

35. See generally WILLIAM RYAN, *BLAMING THE VICTIM* 63 (1971) (describing how the Negro family is scarred by slavery).

36. See ALICE MILLER, *BANISHED KNOWLEDGE: FACING CHILDHOOD INJURIES* 2 (Leila Vennewitz trans., 1990) [hereinafter MILLER, *BANISHED KNOWLEDGE*]. Miller’s article suggests that a child’s authentic feelings start in infancy: “[H]e relies entirely on those around him to hear his cries . . . . The only possible recourse a baby has when his screams are ignored is to repress his distress, which is tantamount to mutilating his soul, for the result is an interference with his ability to feel, to be aware, and to remember.” *Id.* Butterfield, like other writers and scholars, avoided faulting parents not only due to his early childhood experiences with actual or emotional violence, but also due to his unwillingness to acknowledge and to give real weight to such violence in Willie James’ life. Although she had devoted her personal and professional life to helping parents and thus society to come into fully conscious awareness of their repressed childhood history of parental violence, Alice Miller too unconsciously avoided faulting parents when she wrote her seminal piece, *The Drama of the Gifted Child*. She did not acknowledge this oversight until she had written the updated introduction to *For Your Own Good*.

37. See generally MILLER, *FOR YOUR OWN GOOD*, *supra* note 27.

that racism less likely and childhood maltreatment more likely explains why Willie James became a violent criminal offender.

I. “BAD NIGGERS” AND THE EVIL “IMPULSIVENESS”  
GENE: MISREADING THE ETIOLOGY OF WILLIE  
JAMES BOSKET’S RAGE AND RESENTMENT

In *All God’s Children*, Fox Butterfield, writing a powerful biographical narrative, hopes to explain why Willie James Bosket became the most notorious juvenile criminal and killer in New York state history, causing that state to pass a law to try juveniles in adult courts.<sup>38</sup> To be sure, he has a theory that embroiders slavery with Jim Crow, urban decay, absent criminal fathers, well-intentioned mothers, and an inherited “impulsiveness” gene.<sup>39</sup> Willie James, Butterfield says, inherited that gene from James “Butch” Bosket (“Butch”), his father who Willie James never knew, and who was serving life for a double homicide while his mother, Laura, was late in her pregnancy with him.<sup>40</sup> While Butterfield wisely rejects the “crime” gene and the “evil” gene, he nevertheless succumbs to an *ex cathedra* “impulsiveness” gene, which Willie James perhaps had stored in his emotional DNA, urging him to do bad, evil things that he could only overcome with the help of an already overburdened and preoccupied Atlas.<sup>41</sup> In this way, Butterfield impliedly argues that human hands stitched neither intelligence nor violence into Willie James.<sup>42</sup> Rather, larger, historical forces like slavery and white racism darkened the Boskets,

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38. BUTTERFIELD, *supra* note 17, at xii-xiii.

39. *Id.* at 103; cf. ALICE MILLER, *THE DRAMA OF THE GIFTED CHILD: THE SEARCH FOR THE TRUE SELF 2* (1997) [hereinafter MILLER, *THE DRAMA OF THE GIFTED CHILD*] (“The repression of brutal abuse experienced during childhood *drives* many people to destroy their lives and the lives of others. In an unconscious thirst for revenge, they may engage in acts of violence, burning homes and businesses and physically attacking other people, using this destruction to hide the truth from themselves and avoid feeling the despair of the tormented child they once were.”) (emphasis added).

40. *See* BUTTERFIELD, *supra* note 17, at 141.

41. *See id.* at 215. Having trapped a passenger in a subway car that remained in the tunnel when the train stopped at a short platform, Willie James and his cousin, Herman, were prepared to rob him.

Willie posted Herman at the front of the car, then approached the seated passenger. He took out his gun and put it three inches from the man’s head. “Give up your money,” Willie demanded. “I ain’t got any,” the man said. Willie felt a kind of compulsion take hold of him. He pulled the trigger.

*Id.*

42. *See id.* at 51 (“Thurmond’s killing of the salesman occasioned only a little gossip. It was merely a sign of a rising tide of violence in the 1890s. This increase in violence, among both whites and blacks, was another part of the broad crisis of the period in which Pud was born and came of age.”).

and they transmitted what they were given to later kin like Willie James.<sup>43</sup> By 1978, Willie James had truly become a “bad nigger,” a notorious criminal.<sup>44</sup>

Butterfield argues that “bad niggers” relied on a southern “honor” code, which morphed into a “respect” street code to injure, maim, or take lives.<sup>45</sup> Bosket men like Aaron, who carried with him the hard lessons of slavery,<sup>46</sup> like Aaron’s son, Clifton or Pud, who was a new negro in the New South, and like successive generations became infected by the need to first resist Jim Crow and then to stake a claim in the world of which few people—man, woman, or child black or white<sup>47</sup>—could tread with impunity.<sup>48</sup> Bosket “bad men” were feared.<sup>49</sup> Pud was known as a “bad nigger.”<sup>50</sup>

Although violence based on a “respect” code, which was critically important to Pud, had given us “bad niggers,” Butterfield argues that “respect”-based violence was not pathological. Such violence naturally followed from three socially critical norms: first, from southern “honor” killings, on which white men murdered to reclaimed their offended reputations; second, from blacks without access to fair trials; and three, from too few alternate ways of resolving disputes.<sup>51</sup> Given Butterfield’s view, he neither had to proffer a theoretical framework out of which such violence laced the air in black communities, nor had

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43. *See id.* at 61.

“There can be no doubt that crimes among Negroes has sensibly increased in the last thirty years,” Du Bois acknowledged in 1903. But black criminality was not the result of black bestiality and poverty, he insisted. It was the outcome of a history in which whites had made critical errors.

*Id.*

44. *See, e.g., id.* at 211. After killing a person on the subway, Willie James tells his sister, Cheryl, who did not readily believe him, how he acquired a gold, digital watch, which still had the dead man’s blood stains. *Id.* “Sensing her skepticism, Willie said, ‘No, I really shot a man.’ It was then she saw that he was acting kind of puffed up, like he was real bad, real tough, like he had done something to show he was no pushover and he deserved a lot of respect.” *Id.*

45. *See, e.g., id.* at 63 (“All this violence was not simply pathology. It grew out of the old white Southern code of honor, an extreme sensitivity to insult and the opinion of others.”).

46. *See id.* at 44 (“Aaron was cautious. He still carried within him the hard lessons he had learned as a young slave boy—the need for accommodation, the necessity for humility, and the importance of masking his real feelings in a world controlled by whites . . . [H]e followed the etiquette of racism and spoke to his landlord as “boss” or “captain,” terms that replaced “master” after the end of slavery. “Just try and live lowly and humble,” he advised his family.”).

47. *See id.* at 64-65.

48. *See id.* at 46-67.

49. *See id.* at 63 (“Pud lived by a code. ‘He didn’t bother nobody, but if you pushed him, you had to beat him,’ his brother Dandy said. ‘Step on his foot, at a dance or walking by, just brush him, and there’d be a fight. He wasn’t never scared.’”).

50. *See id.* at 58 (“Pud was the last in the line that day, and as he came up to the wagon, the landlord said, ‘I’m going to whip you real bad, ‘cause you’re a bad nigger.’”).

51. *Id.* at 63.



to query why all blacks, even those with educations and property, did not settle disputes that way.<sup>52</sup> Given Jim Crow laws, Pud's violence perhaps was cathartic, giving an oppressed black man a much-needed psychological release.<sup>53</sup> Despite the death of Jim Crow, it was perhaps the same release that young blacks in the 1970s and 1980s needed when they abandoned broken homes for violent gangs.<sup>54</sup> Perhaps this release explains why Willie James fought without provocation, stole wantonly, obsessed over fire, and saw slights where none existed.<sup>55</sup> Although Butterfield lays down narrative tracks that clearly noted that Pud, James, Butch, and successive generations were "bad nigger" Boskets, he never ventured down an existential rabbit hole in which he would have found maltreating parents, especially black women, who more than likely never completely bonded with their children, especially males.<sup>56</sup> As such, Pud's and Butch's violence, like Willie James', flowered not solely of transmuted "honor" codes, but deeply out of deeply internalized pathological rage and resentment.<sup>57</sup>

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52. See *id.* at 65. This describes how Pud went to live with the daughter of his father's sister, Carrie, who "had done the best of any of the Boskets, having married Guy Harris, a former slave who had learned to read and write and during Reconstruction had managed to buy some land not far from Pleasant Hill church. He grew his own cotton and was not a sharecropper." *Id.*

53. See *id.* at 58 (quoting BENJAMIN MAYS, *BORN TO REBEL* 25-26 (1971) ("Negroes lived under constant pressure and tensions all the time in my community. They knew they were not free. They knew that if attacked they dare not strike back—if they wanted to live. . . . I believe to this day that Negroes in my county fought among themselves because they were taking out on other Negroes what they really wanted but feared to take out on whites.")).

54. See generally Patterson, *supra* note 23, at 16 ("[There is a] powerful attraction of the violent street gang and 'cool pose' culture for the under-and lower-class youth").

55. See, e.g., BUTTERFIELD, *supra* note 17, at 189 ("[Willie James] got angry at a dry cleaner for allegedly damaging a pair of his pants. Willie cursed the employees in the shop, then smashed a plate-glass window. The strange thing was, his mother noticed, there was nothing wrong with his pants."); see also MAGID & MCKELVEY, *supra* note 34, at 77 ("Children who have not formed the proper attachments display a number of telling symptoms. . . . All children at one time or another may display some of these characteristics, but it is the disturbed child who will continually display a number of them. Several of the symptoms are so indicative of pathology, that any child displaying these should be evaluated: preoccupation with fire, blood or gore; cruelty to others or animals; abnormalities in eye contact; lack of ability to give or receive affection; self-destructive behavior.").

56. See BUTTERFIELD, *supra* note 17, at 190 ("Cruise had gotten to know the Bosket family well by now, and he thought Willie's relationship with his mother was a source of much of the trouble. Laura struck him as a gruff, surly, cold person.").

57. See *id.* at 107 (explaining that Dr. Leonard J. Bolton diagnosed Butch as a "sociopathic personality, antisocial type," who was "resentful and hostile," and who "has turned his resentfulness and hostility against the world."); see also MILLER, *FOR YOUR OWN GOOD*, *supra* note 27, at ix-x (discussing the compulsion to repeat our childhood maltreatment on others, including children or other innocent surrogates).

Before slavery,<sup>58</sup> black parents may have slowly “cured” pathological rage and resentment in males by imposing obedience training and rigid physical violence upon their children’s bodies.<sup>59</sup> During slavery, black parents hardened their children by exposing them to extreme weather,<sup>60</sup> by not soothing them if they cried,<sup>61</sup> by brutally beating them to prevent tattling,<sup>62</sup> or by requiring absolute obedience to them and elders.<sup>63</sup> During slavery and Jim Crow, black parents perhaps fought in front of their children, which could have traumatized them.<sup>64</sup> Moreover, Laura clearly abused Willie James,<sup>65</sup> rather

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58. See, e.g., ANDREW BILLINGSLEY, CLIMBING JACOB’S LADDER; THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES 92 (1992) (discussing Ptah Hotep’s Egyptian teachings on the proper way in which a father must violently deal with a child who dishonors the father by replacing his wisdom or teachings with the child’s own ignorance).

59. See Cf. Ellis, *supra* note 5, at 48 (“Our fathers are like Gods and our mothers also. . . . [I]t was absolutely wrong to disobey parents or call in to question their actions. . . . [I]t is generally accepted that punishment is a very important part of caring and a necessary part of good parenthood. . . . [A] substantial number of . . . Ga adolescents [liked that their parents punished them] . . . “my father punishes me to be good; she insults me . . . when I am bad.”).

60. See, e.g., SCHWARTZ, *supra* note 6, at 43 (“[You can achieve the] hardening of children by bathing them in cold water or exposing their limbs to cold.”).

61. See HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925 219 (1976). Gutman quoted Laura Towne, who said:

That was so even though parents “were exceedingly severe.” She remembered only one instance of “anything like indulgence toward children.” “I think they . . . will bear pain to any extent,” said Towne. “If a boy cries too early because he is suffering they will deride him. He must be stoical under trouble and his parents will not suffer complainings.”

*Id.* According to Alice Miller’s psychoexistentialism, any child who suffered and survived hardening in the slave quarters had learned that screams, cries, and emotional vitality would be viewed as weaknesses by her mother or other caregivers. Moreover, that child would also realize that her cries from such hardening would not be answered by her mother’s love and tenderness. She would thus learn to avoid further humiliation by deeply repressing her natural, normal emotional authenticity. Unfortunately, one of the consequences of such deadening would be a neurotic personality. In the worst case, *viz.*, Butch and Willie James, a child might become poorly attached to that hardening and emotionally unavailable parent, which could cause her to develop an antisocial personality, if she were not fortunate enough to have a helping witness enter her life.

62. See SCHWARTZ, *supra* note 6, at 100-01.

63. See GUTMAN, *supra* note 61, at 218-19.

64. See, e.g., Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2134-40 (1996) (illustrating that after slavery, black men were perhaps generally beating their black female wives, but also suggesting that prosecutors were motivated to convict them due to racist concerns that blacks not enjoy the privileges that were normally enjoyed by white masters); see also *Harris v. State*, 14 So. 266, 266 (Miss. 1894) (reversing and remanding conviction for assault with intent to kill of a black based on insufficient evidence); *Fulgham v. State*, 46 Ala. 143, 144 (1871) (upholding the assault and battery conviction of an emancipated slave for beating his emancipated wife after she interrupted him for what she thought was excessive corporal punishment on their child); LEON LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 349 (1999) (recalling her experiences shortly after emancipation, she stated: “Dat was the meanest niggah dat ever lived. He would slip up behin’ me when I was wukin’ in the fiel’ an beat me.”); LITWACK, *supra*, at 350 (“If I had a twenty-dollar bill this mornin for every time I seed my daddy beat up my mother and beat up my stepmother I wouldn’t be settin here this mornin because I’d have up in the hundreds of dollars

than nurturing him. If Willie James were experiencing difficult issues and emotions, Laura would not, perhaps could not, soothe him. For example, in response to a psychiatrist informing her that Willie James might attempt to hurt himself, Laura said she would “beat the craziness out of him.”<sup>66</sup> Despite Laura’s statement, the doctor was still reluctant to directly fault Laura for physically abusing Willie when the doctor concluded that although he was depressed, he really suffered much more from abusive, emotional neglect.<sup>67</sup> That kind of abusive neglect can truly damage a child,<sup>68</sup> and if that emotional abuse gets coupled with physical maltreatment, a child can suffer severe neurosis.<sup>69</sup>

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. . . .”); Siegel, *supra*, at 2139 n.85 (quoting Elizabeth Pleck, *Wife Beating in Nineteenth-Century America*, 4 VICTIMOLOGY 60, 65 (1979) (“Between 1889 and 1894, fifty-eight out of sixty men arrested for wife beating in Charleston, South Carolina were black.”)); Siegel, *supra*, at 2139-40 n.85 (citing 40 CONG. REC. 2444, 2449 (1906) (remarks of Rep. Sims) (“[D]ebating bill to punish wife beaters in District of Columbia by flogging at whipping post and discussing committee report in support of bill that indicated that ‘in the fourth precinct there were 14 white and 72 colored out of a total of 86 arrests for wife beating, and in the sixth precinct there were 23 white and 73 colored out of a total of 96 arrests for this offense.’”)).

65. See, e.g., BUTTERFIELD, *supra* note 17, at 140.

66. *Id.* at 147; see MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 16 (“For parents’ motives are the same today as they were then: in beating their children, they are struggling to regain the power they once lost to their own parents.”)

67. See BUTTERFIELD, *supra* note 17, at 147.

68. See *id.* at 190. Laura rejected her children emotionally, which has a powerful developmental impact on children. See *id.* Her daughter, Shirley, who was otherwise bright and had been enrolled in a special class for intellectually gifted children, tried to get her mother to appreciate that she’d played her flute for several minutes without an error. See *id.* After telling her mother that she’d played without a mistake and sheet music, Laura growled: “What’s that? It don’t sound like nothing!” *Id.* Undaunted, Shirley solicited her mother’s attention again. See *id.* She took the flute and sheet music over to her mother, saying: “See. Here it is.” *Id.* In response, Laura snarled: “Go away! I don’t want to see any of that stuff.” *Id.* At this rejection, Shirley fled into the streets. See *id.* Later in life, Shirley followed Willie James’s path, rejecting her innate intelligence because Laura doused her daughter’s inner light with the dark poison of emotional rejection. See *id.* And so, “at the age of twelve, she began playing hooky, and did not come home for days at a time.” *Id.* at 330.

69. See MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 61 (arguing that the price we pay for honoring any commandment not to blame our parents leads to “severe neurosis”); cf. ARTHUR JANOV, WHY YOU GET SICK, HOW YOU GET WELL: THE HEALING POWER OF FEELINGS 22-23 (1996) [hereinafter JANOV, WHY YOU GET SICK] (“Neurosis involves being what one is not in order to get what doesn’t exist. If love existed, the child would be what he is, or that is love—letting someone be what he or she is. Thus, nothing wildly traumatic need happen in order to produce neurosis. It can stem from forcing a child to punctuate every sentence with ‘please’ and ‘thank you’ to prove how refined the parents are. It can also come from not allowing the child to complain or cry when he is unhappy. Parents may rush in to quell sobs because of their own anxiety. They may not permit anger—‘good girls don’t throw tantrums; nice boys don’t talk back’ – to prove how respected the parents are. The child gets the idea of what is required of him quite soon. Perform, or else. It is the hopelessness of never being loved that causes the split. The child must deny the realization that his own needs will never be filled no matter what he does. He then develops substitute needs, which are neurotic.”).

It is entirely possible that since Pud's day, if not before, severe neurosis may explain why black parents have relied on obedience training and rigid physical violence, a childrearing style that unwittingly turns little boys into "bad niggers."<sup>70</sup> It is not that slavery did not traumatize black adults or children. Of course, it did. Rather, it is that black parents were principally the first humans, or external forces, to traumatize black infants' bodies by not meeting their primal needs.<sup>71</sup> After all, during slavery, infants were birthed into families and to parents who deeply cherished children. Due to that love, they would have wanted them to survive,<sup>72</sup> no less than they would in West Africa. So during infancy, parents would harden them, hoping that such rites would prepare younglings to survive into adulthood.<sup>73</sup> Given that slave masters required strict obedience of adult slaves, parents had to condition their children early, perhaps during infancy, to strictly obey them.<sup>74</sup> Whether in slavery or Jim Crow, children, therefore, had to know their "proper" place—in the slave quarters, on the plantations, or on the sharecropper's field.<sup>75</sup> As a result, few black

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70. See STRAUS WITH DONNELLY, *supra* note 5, at 118. On this point, they write: [Researchers] studied children with severe behavior problems. They found that when the parents of these children used corporal punishment or verbal aggression to control the child's misbehavior, the child tried to use similar coercive tactics with the parents. The parents, of course, regarded this as more misbehavior and punished even more; and in turn the children became more coercive and hostile. [With this] escalating feedback loop, . . . parents unintentionally legitimize violence. . . .

*Id.*

71. See ARTHUR JANOV, *THE NEW PRIMAL SCREAM: PRIMAL THERAPY TWENTY YEARS LATER* xviii-xix (1993) [hereinafter JANOV, *THE NEW PRIMAL SCREAM*]. The child's primal needs are love, shelter, and protection, and "[p]rimal Pains arise not only from this lack of love but from those epiphanic moments or scenes when a child realizes he is not loved and will not be. They arise when he is shaken for a brief and forgotten moment by the understanding that he cannot be what he is and be loved, for that moment and for other moments of equally monumental hopelessness." *Id.*

72. See SCHWARTZ, *supra* note 6, at 43 ("Slaves followed their own customs in caring for newborns . . . Dr. Dewees recommended against deliberate 'hardening' of children by bathing them in cold water or exposing their limbs to cold."). *But see id.* ("For [Dr. Dewees], the high morality rate among poor children, whose parents routinely exposed them to the elements, offered proof that such a strategy did not work to promote health.").

73. *Id.*

74. See *id.* at 98 ("Owners recognized the influence parents had over [their children] and urged them to subdue children and turn them into dutiful and submissive servants."); *id.* (stating that white masters required strict obedience to black "mother[s], father[s], other relatives, and caretakers"); *id.* (noting that slaves preferred to physically punish their children or switching, rather than allow white masters to impose their will or thwart their parental prerogative). "[H]er Alabama master tried to punish Eliza Evans for sassing him, the young girl ran to her grandmother for protection, only to be whipped by the older woman. The master left satisfied that Eliza's insolence had been suitably punished. . . ." *Id.*

75. See LITWACK, *supra* note 64, at 4 ("Son . . . a catfish is a lot like a nigger. As long as he is in his mudhole he is all right, but when he gits out he is in for a passel of trouble. You 'member dat, and you won't have no trouble wid folks when you grows up.").

parents doted on their children,<sup>76</sup> and they rarely tolerated attitudes that might subject them to the master's or overseer's whip, *viz.*, complaints, backtalk, tears, or outward signs of emotional distress.<sup>77</sup> In short, slaves used rigid violent discipline preemptively to ensure that youthful innocence did not endanger other slaves,<sup>78</sup> and they repressed their natural, healthy emotional reactions to instructions, experiences, hierarchy, discipline, or work,<sup>79</sup> without regard to whether such repression might cause black children to suffer neurosis.

To apply swift, rigid, and violent discipline to black children's behavior or attitudes,<sup>80</sup> all in the name of strict obedience training and rigid physical violence, would cause not only severe neurosis, but also unexpressed rage and resentment, which might co-create the very behavior, personality,<sup>81</sup> or attitudes these parents wished to destroy.<sup>82</sup> During their lives, Pud, James, and Butch suffered obedience training and rigid physical violence, which they had to repress. Yet, such repression ultimately renders them emotionally blind to the real cause of their rage and resentment, and so they projected violence onto anyone (i.e., their monsters) who did symbolically what they had suffered

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76. See GUTMAN, *supra* note 61, at 216-20.

77. *Id.* at 219-20.

Socializing children to respect all elderly blacks also may have taught them to hide slave feelings and beliefs from nonslaves. . . . "If a boy cries too early because he is suffering they will deride him. He must be stoical under trouble and his parents will not suffer complainings. Children undergo a regular discipline."

*Id.*

78. See, e.g., SCHWARTZ, *supra* note 6, at 101 ("When one little girl in Virginia accidentally came upon some adults preparing to eat lamb, a food normally unavailable to slaves, an old man took her 'out back of the quarter house' and whipped her severely, explaining: 'Now what you see, you don't see, and what you hear, you don't hear.'"); *id.* at 100 ("Adult slaves worried about the tendency of young children to blurt out information to the white folks that would prove detrimental to their interest. Penny Thompson told her master of a plot to help slaves escape from his plantation in Alabama.").

79. See MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 38.

What can a child do when she is left so utterly alone with her panic, her impotent fury, her despair and anguish? The child must not even cry, much less scream, if she doesn't want to be killed. The only way she can get rid of these emotions is to repress them.

*Id.*

80. See, e.g., V. Lawson Bush, *How Black Mothers Participate in the Development of Manhood and Masculinity: What Do We Know About Black Mothers and Their Sons?*, 73 J. OF NEGRO EDUC. 381, 391 (2004) ("With disciplining their sons, the fathers emphasize setting high expectations early, discussing the punishment with their children when they misbehave, and reacting on the spot . . .").

81. See, e.g., MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 24-29 (discussing how repressed rage and resentment can cause adults who were severely maltreated to become serial killers, murdering 360 women); see also ALICE MILLER, *FREE FROM LIES: DISCOVERING YOUR TRUE NEEDS* 47-89 (Andrew Jenkins trans., 2007) [hereinafter MILLER, *FREE FROM LIES*] (discussing how severely maltreated children go from "victim" to "destroyers").

82. See CLARK, *supra* note 23, at 70-74 (discussing the hyper masculine and grandiose attitudes of black males in the ghetto).

as infants, toddlers, and helpless children.<sup>83</sup> To be sure, such black parents convinced themselves that they were helping their children, without acknowledging that they were simply projecting their rage and resentment onto their children.<sup>84</sup> For example, after putting Willie James through a battery of psychological evaluations, the staff at Children's Psychiatric Center at Rockland State Hospital concluded in part that "Willie's real problem . . . has to do with his underlying sense of inferiority and insecurity and the rage which he personally feels towards his mother and which his mother expresses to the world partly through his behavior."<sup>85</sup> I suspect that as a child, Laura, Willie James's mother, raged because her mother maltreated her, especially by hardening her against men, perhaps implicitly her father,<sup>86</sup> and to compensate for and get even with innocent surrogates. Unfortunately, Laura then directly poured her rage into her son, Willie James, through obedience training, rigid physical violence, and emotional neglect.<sup>87</sup> And he became the "real bad-ass kid"<sup>88</sup> that she both needed and feared, principally because she needed a proxy, a tool, who had hurt others,<sup>89</sup> which probably explains why she married

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83. See BUTTERFIELD, *supra* note 17, at 253; MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 98 ("But repression is a perfidious fairy who will supply help at the moment but will eventually exact a price for this help. The impotent fury comes to life again when the girl's own child is born, and at last the anger can be discharged—once again at the expense of a defenseless creature."). Butch stated upon learning that his son, Willie James, had been sentenced to reformatory for killing someone: "Of all people, I can understand my son's situation. I went through the same rage at being neglected. I've been battling the same monsters all my life." BUTTERFIELD, *supra* note 17, at 253.

84. See BUTTERFIELD, *supra* note 17, at 102 ("Butch's parents had physically fought in his presence; both his father and his mother had abandoned him as an infant; and his father as well as his grandmother had savagely beaten him. Psychiatrists were just beginning to understand that this kind of abuse has lasting effects on its victims, filling them with rage and giving them a model for their own later behavior, thus creating a cycle of violence."); cf. MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 63 (citing Elisabeth Trube-Becker, who publicly acknowledges the prevalence of child abuse in various forms within the immediate family).

85. BUTTERFIELD, *supra* note 17, at 192.

86. *Id.* at 134 ("I didn't know nothing about my father. I didn't remember him. Just some other man gone, that's all. My mother took the place of him. She was a good mother.'").

87. See MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 61.

What becomes of this forbidden and therefore unexpressed anger? Unfortunately, it does not disappear, but is transformed with time into a more or less conscious hatred directed against either the self or substitute persons, a hatred that will seek to discharge itself in various ways permissible and suitable for an adult.

*Id.*

88. BUTTERFIELD, *supra* note 17, at 197 (Rich Green, a big strong, smart ex-con said of Willie James: "That's a real bad-ass kid.").

89. *Id.* at 164 (About to fight a boy older and larger than him, "Willie remembered the rules of the street and what his mother had taught him. 'Don't be bullied,' she had said. 'Hit back. To get respect, you've got to be the toughest.'").

Butch<sup>90</sup> and because she could not control in Willie James what she had failed to control in herself—rage and resentment.<sup>91</sup> By using obedience training and rigid physical violence, which perforce deny the child any right to express his own anger, Willie James became at the very least severely neurotic.<sup>92</sup>

Without regard to his neuroticism, it had become evident in 1975 that Willie James's problems originated not with slavery, Jim Crow, urban decay, or modern-day racism, but with his black mother, Laura.<sup>93</sup> A newborn child has no social memory of slavery and its legacy; however, based on his caregiver's love, tenderness, rejection, or maltreatment, he will definitely have a childhood history, which he will accept as normal, and which can shape his personality and behavior.<sup>94</sup> Given her history of physically and emotionally maltreating Willie James, Laura had been likely traumatized by her mother, especially after her father abandoned the family,<sup>95</sup> which must have embittered the mother because Laura strongly identified with her and internalized her deep anger toward black men, believing men used women for sex and for making babies before leaving them.<sup>96</sup> Later, she praised her,<sup>97</sup> stating that after Butch's conviction for double mur-

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90. *Id.* at 162 (“When [Arruth Artis] walked into the room in the administration building to fetch Willie, the first thing Artis saw was that he was peeking up the dresses of the secretary and a receptionist. Laura was sitting there laughing. This bothered Artis, and she started to say something, but Laura quickly told her, ‘He’s just like his father. Where’s his father?’ Artis asked. ‘In jail,’ Laura answered, as if that told you everything you needed to know about Willie.”).

91. *Id.* at 194 (“Laura was in despair. She had a good idea of what Willie was up to and tried to stop it, but felt powerless.”); *id.* at 192 (“Willie’s real problem, the group concluded, ‘has to do with his underlying sense of inferiority and insecurity and the rage which he personally feels towards his mother and which his mother expresses to the world partly through his behavior.”).

92. See MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 61.

93. BUTTERFIELD, *supra* note 17, at 190.

94. See MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 4 (“It is very different for children: they have no previous history standing in their way, and their tolerance for their parents knows no bounds. The love a child has for his or her parents ensures that their conscious or unconscious acts of mental cruelty will go undetected.”).

95. See BUTTERFIELD, *supra* note 17, at 134 (“Laura never knew her father. . . . All her mother told her was that her father’s name was Benjamin and that he had died in a car accident when she was about two years old.”).

96. *Id.* (“‘They put it in, then they’re gone,’ she often said. ‘Shame on them.’ That was as much as she allowed herself to feel.”). In discussing a psychopath’s childhood history of maltreatment, Kenneth Bianchi often drew pictures, “[o]ne side was the image of a man; the other, a horrible demon. He was a child who bore the brunt of his mother’s wrath at her gambling husband. She often hit and badgered Bianchi, who at a young age would hide from her.” *Cf.* MAGID & McKELVEY, *supra* note 34, at 17.

97. *Cf.* MAGID & McKELVEY, *supra* note 34, at 16.

Kenneth Bianchi [a mass murderer] had suffered from APD [namely, Antisocial Personality Disorder] since young childhood. Records obtained by the police showed that his

der, she could not have made it without her mother.<sup>98</sup> She also learned to repress her feelings.<sup>99</sup> As Willie James got worse, Laura emotionally disowned him.<sup>100</sup> It was as if Butch had carried Willie James for ten months, and then turned him over to her to raise.<sup>101</sup> Although they found no psychosis, in 1975, doctors at Bellevue Hospital concluded that Willie James “was suffering from ‘[u]nsocialized aggressive reaction of childhood.’”<sup>102</sup> At the very least, then, he had “childhood antisocial behavior, a junior psychopath in the making.”<sup>103</sup>

Yet, Butterfield attributes Willie James’ antisocial, criminal behavior not to obedience training, rigid physical violence, and emotional neglect, but to larger, social, external forces and quasi-inheritable factors like Butch’s “impulsiveness” gene.<sup>104</sup> Unfortunately, this gene crawled off the master’s plantation when slavery ended, and undoubtedly freed adults to infect the next generation with their need for servility, which they acquired as children in the slave’s quarters.<sup>105</sup> It was in these quarters that infant, toddler, and young

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descriptions of his mother as a “saintly woman” were far from the truth. (It is typical for adults who were neglected as children—and become unattached children—to deny that their mothers were cruel to them).

*Id.*

98. BUTTERFIELD, *supra* note 17, at 190 (“When Cruise raised the point with Laura, she replied, with indignation rising in her voice, ‘I never would have made it without my mother.’”).

99. *See id.* at 161 (“Laura was guarded as usual in what she revealed . . . . Most mothers bringing their sons to Wiltwyck were struggling with anguish or guilt or anger, but Laura showed no particular emotion. She seemed to have successfully disassociated herself from the process . . . .”).

100. *Id.*

101. *Id.*

Laura’s emotional disassociation grew out of this physical disconnection [because Willie James was the spitting image of Butch]. It was as if Willie were all his father’s doing, as if someone had given her a child other than her own, as if Willie were a stranger in her house. Whoever he was, whatever he was doing, it was because of his father, not her.

*Id.*

102. *Id.* at 192.

103. *Id.*; *see* MAGID & MCKELVEY, *supra* note 34, at 9 (“[P]sychopathy is a serious illness despite its ‘mask of sanity.’ In it he gives a vivid and succinct account of psychopathy, saying the severe psychopath may seem to be enjoying . . . ‘robust mental health. Yet he ‘has a disorder that often manifests itself in conduct far more seriously abnormal than that of the schizophrenic . . . . We are dealing here with not a complete man at all but with something that suggests a subtly constructed reflex machine.’”); BUTTERFIELD, *supra* note 17, at 147 (refusing to call Willie James a psychopath; rather, seeing his depressive features and believing that he’d been at the very least emotionally neglected by Laura, and diagnosing him as a “[h]yperkinetic reaction of childhood with depressive features”).

104. BUTTERFIELD, *supra* note 17, at 103 (“Impulsiveness is a trait of temperament, and such traits are to some degree inheritable. Pud, James, and Butch were all impulsive.”).

105. *Cf.* SCHWARTZ, *supra* note 6, at 78 (“Slaves needed to cooperate with masters and mistresses and to teach children the day-to-day deference owners considered their due while at the same time securing the youngster’s loyalty to his or her family and the larger slave community.”).



children encountered one aspect of what I call the “*twin pillars of oppression*.” Before I discuss one aspect of these pillars, consider Aaron Bosket, an adult former slave, and Pud’s father—the first “bad nigger” Bosket.<sup>106</sup> “Aaron was cautious.”<sup>107</sup> Even after slavery, he naturally still suffered from the burdens of those practices that killed his vitality, spontaneity, and authenticity.<sup>108</sup> As a slave boy, and later as an adult, he thus needed to accommodate the more powerful, and he facially humbled himself when he encountered them. To ensure that those with more power could not detect how he felt about accommodating them and suffering their humiliating acts, Aaron repressed his feelings.<sup>109</sup> In short, he had become neurotic, able to bury his natural, normal feelings around those who refused to meet *his* needs and who maltreated *him*.<sup>110</sup> As a slave infant, toddler, and child, the only person Aaron would have first encountered who had more power than him were his parents.<sup>111</sup> Given that they really loved him and given that they would want him to stay among the living, Aaron’s parents would have prepared him to know his proper place, not just within West African culture where young children must be strictly obedient to their parents and elders, but also within slavery where he needed equally to obey his master. To ensure his obedience and thus survival, Aaron’s parents would have immediately taken steps to slowly, but

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106. BUTTERFIELD, *supra* note 17, at 45 (“Pud would take a different course. He would not be meek and humble like his father; he would not emigrate. As he was growing up in the 1890s, the most turbulent, dangerous decade yet for blacks in Edgefield, his quest for self-respect would lead him into violence.”).

107. *Id.* at 44.

108. *See id.*; *see also* MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 58. A child’s authentic feelings start in infancy; “he relies entirely on those around him to hear his cries . . . . The only possible recourse a baby has when his screams are ignored is to repress his distress, which is tantamount to mutilating his soul, for the result is an interference with his ability to feel, to be aware, and to remember.” MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 2.

109. BUTTERFIELD, *supra* note 17, at 44.

110. *See* JANOV, WHY YOU GET SICK, *supra* note 69, at 21 (arguing that if a child begins to suppress his first feelings, the neurotic process begins, and then by the by, the child develops dual selves: one real, the other unreal, and “[t]he unreal self is the cover of those feelings and becomes the facade required by neurotic parents in order to fulfill needs of their own”). Janov further argues:

If there is absolutely no possibility of reacting appropriately to hurt, humiliation, and coercion, then these experiences cannot be integrated into the personality; the feelings they evoke are repressed, and the need to articulate them remains unsatisfied, without any hope of being fulfilled. It is this lack of hope of ever being able to express repressed traumata by means of relevant feelings that most often causes severe psychological problems. We already know that neuroses are a result of repression, not of events themselves.

MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 7.

111. *Cf.* WILMA A. DUNAWAY, THE AFRICAN-AMERICAN FAMILY IN SLAVERY AND EMANCIPATION 78 (2003) (“‘All mothers were stric’ . . . ‘that made children stand fear everywhere they went.’”).

assuredly break his will.<sup>112</sup> Once beaten, humiliated, and manipulated into his proper place, Aaron would have then blindly and respectfully followed his mother's instructions,<sup>113</sup> and he would love her, too.<sup>114</sup> By so doing, Aaron had suffered the first pillar of oppression, which his parents imposed on him.<sup>115</sup>

Of course, Aaron would have viewed slavery and plantation life differently from even the hard-learned lessons of the slave quarters. Given that his slave community supported and loved him, he would view accommodating whites, suffering humiliation, and suppressing feelings as perhaps different from properly respecting his parents or elders. He would belong to that community; however, he was owned by his master. And so, whites were the socialized others. Without compensation, whites worked them. Without mercy, whites beat him and his loved ones. Without just cause, whites murdered his kind and kin. Without neither respect nor permission, whites violated mothers, aunts, and sisters. Without regard for humanity, whites sold fathers, mothers, and children from their loved ones. To survive these hard lessons, Aaron would have had to keep his vitality, spontaneity, and authenticity locked away where he had buried them under the tutelage of the first pillar of oppression. Given the likelihood of the fore-

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112. See *id.* at 78 ("To prevent worse discipline from the whites, William Mead's mother would whip him 'for sassing' the master. Alex Montgomery's overseer 'neber did whup [him] but [his] mammy wurk'd on [his] back an' sed [he] was triflin.'"); cf. TIMYAN, *supra* note 25, at 18 ("Among the Igbo, a mother or family member will give a baby a piece of yam or fruit and then ask for it back again; if the infant is reluctant to give it up, pressure is put on him to do it against his will.").

113. See STRAUS WITH DONNELLY, *supra* note 5, at 116-17 (a prominent black sociologist said, "If you live in a society in which respect means willingness to be violent to uphold one's principles and be respected, how can parents who are not willing to whup a child be respected?").

114. Cf. PHILIP GREVEN, SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE 21 (1992). Writing in 1754, Esther Burr, who became the wife of Reverend Aaron Burr, president of Princeton, stated:

"I had almost forgot to tell you that I have begun to govourn Sally [her firstborn child]. She has been Whip'd once on *Old Adams* account, and she knows the differance between a smile and a frown as well as I do. When she has done any thing that she Surspects is wrong, will look with concern to see what Mama says, and if I only knit my brow she will cry till I smile, and altho She is not quite Ten months old, yet when she knows so much, I think tis time she should be taught."

*Id.*

115. See DUNAWAY, *supra* note 111, at 77. On this point, Dunaway writes:

By reproduction of labor power, I mean simply that "the task of the family is to maintain the present work force and provide the next generation for workers, fitted with the requisite skills and values necessary for them to be productive members of the work force." Harsh as it sounds, the slave household was expected "to carry out the repressive socialisation of children. The family must raise children who have internalised hierarchical social relations, who will discipline themselves and work efficiently without constant supervision."

*Id.*

going, he had survived the second pillar of oppression—slavery. Upon leaving the plantation, Aaron brought those hard lessons with him. A cautious person, he “followed the etiquette of racism and spoke to his landlord as ‘boss’ or ‘captain,’ terms that replaced ‘master’ after the end of slavery. ‘Just try and live lowly and humble,’ he advised his family.”<sup>116</sup>

To inculcate his family on the full import of “live lowly and humble,” Aaron would have beaten his children violently if they did not abide by his teachings. After all, hard heads make soft asses. Invariably, he would have heard this warning. Yet, he would remember the hard lessons, just like that young child did when an elder violently beat her not for what she did, but for what she might do: “Now what you see, you don’t see, and what you hear, you don’t hear.”<sup>117</sup> And if they had inflicted such rigid violent discipline on him since he was an infant and toddler, Aaron would not remember these earliest assaults on his body.<sup>118</sup> Fortunately, his body would never forget.<sup>119</sup> Despite his self-deprecating demeanor, Aaron accordingly would be filled with rage and resentment because under the first pillar of oppression, he learned cruelty *as* love from his parents, and under the second, he learned obedience *and* cruelty from his slave master.<sup>120</sup> Either way, none of his specific developmental needs was met.<sup>121</sup> Rage and resentment come from unmet needs.<sup>122</sup> Unconsciously, apart from his-

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116. BUTTERFIELD, *supra* note 17, at 44.

117. SCHWARTZ, *supra* note 6, at 101.

118. See GREVEN, *supra* note 114, at 19 (“When painful blows are inflicted upon infants, not even memory suffices to tell the stories firsthand. . . . The body and the brain probably encode such pain, but none of us has any conscious recollection of blows experienced very early in life.”); MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 2-3 (“[Parents who were maltreated] will not remember the torments to which they were once exposed, because those torments, together with the needs related to them, have all been repressed: that is, completely banished from consciousness.”).

119. See generally ALICE MILLER, THE BODY NEVER LIES: THE LINGERING EFFECTS OF HURTFUL PARENTING 32 (Andrew Jenkins trans., 2005) [hereinafter MILLER, THE BODY NEVER LIES] (“Accordingly, their bodies—the spurned and humiliated child within—still did not feel understood and respected. The central point in all this is that the body cannot relate to the commandments of morality. Ethical concerns are entirely alien to it. Bodily functions like breathing, circulations, digestion respond only to the *emotions we actually feel*, not to moral precepts. The body sticks to the facts.”) (emphasis added).

120. See SCHWARTZ, *supra* note 6, at 96 (“Slaves displayed loyalty to their owners, at least outwardly, and slaveholders rewarded this with better treatment.”).

121. *Id.* at 76 (“Slaveowners [eventually and cynically] understood that the quality of care provided children affected their survival, and their understanding of child development led them to conclude that slaves in their early years formed lasting habits of mind and behavior: attachment or animosity, diligence or dereliction, complacency or discontent.”).

122. See MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 3 (“[W]e have statistics showing clear connections between early neglect and abuse and subsequent adult violence, [*viz.*, rage].”).

torical context, Aaron would have been little different from Laura.<sup>123</sup> Neither recalled their childhood histories of cruelty *as* love. Neither gave love and tenderness to their children. By not so recalling their histories, they perforce inflicted obedience training and rigid physical violence on their children, believing that they were actually loving them.<sup>124</sup> In his effort to teach Pud his proper place in the era of neo-slavery, Aaron gave us Pud, a “bad nigger,”<sup>125</sup> and in her effort to vent her anger and hatred of men like her father and Butch, Laura co-created Willie James, a real “bad boy.”<sup>126</sup>

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123. See LLOYD DEMAUSE, FOUNDATIONS OF PSYCHOHISTORY iv-v (1982) (arguing for a psychohistorical approach that searches for historical motivation because all “motives are personal,” which require psychohistorians to engage in historical comparative analyses and discover how “history [is] more about how private fantasies are acted out on the public stage”).

124. See MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 32 (“If a mother could feel how she is injuring her child, she would be able to discover how she was once injured herself and so could rid herself of her compulsion to repeat the past.”).

125. See BUTTERFIELD, *supra* note 17, at 44. Consider Butterfield’s words about Aaron, especially in light of Miller. Butterfield writes:

Aaron was cautious. He still carried with him the hard lessons he had learned as a young slave boy—the need for accommodation, the necessity of humility, and the importance of masking his real feelings in a world controlled by whites. So he did not openly object when whites call him “boy,” or later, as he grew older, referred to him as “uncle.” No white used the term “Mr.” before his name. In turn, he followed the etiquette of racism and spoke to his landlord as “boss” or “captain,” terms that replaced “master” after the end of slavery. “Just try and live lowly and humble,” he advised his family.

*Id.* As such, even though Butterfield does not explore this point, Aaron must have attempted to raise his first son, Clifton, or Pud, to accommodate whites, to act humbly, to mask his real feelings, or to repress his anger. Given the hard lessons Aaron acquired as a young boy in slavery, which were probably delivered by beatings and punishments, Aaron would have relied on the cultural presumption that obedience training and rigid physical violence were indispensable to the proper raising of a black child, especially a male, and especially during Jim Crow. In effect, if Miller, DeMause, and Straus are correct, then Aaron’s culturally sanctioned violence toward Pud gave birth to him violently enforced demand for respect not from his father but from others. *Id.* at 45 (stating that Pud would reject Aaron’s accommodations, and so he would not be “meek and humble.” He would not leave Edgefield. Rather, Pud’s “quest for self-respect would lead him into violence.”). On this point, Bell Hooks tells how Zora Neale Hurston’s parents worried over how to raise her during Jim Crow:

Many southern black people living today remember being harshly and unjustly disciplined by parents who feared for our safety. In many black families parents often thought that they needed to “break the spirit” of a willful, creative child in order to prepare them for living in the world of racial apartheid. . . . [Hurston’s] father feared that she would pay a price for her rebellious nature. She remembered him saying, “The white folks were not going to stand for it. I was going to be hung before I got grown.” Taught to accept subordination, black children naturally felt in a state of psychological conflict. On one hand we had to possess enough self-esteem to seek education and self-advancement, yet on the other hand we had to know our place and stay in it. All too often parents used harsh discipline and punishment to teach black children their “proper place.”

*Cf.* BELL HOOKS, SALVATION: BLACK PEOPLE AND LOVE 22-23 (2001).

126. BUTTERFIELD, *supra* note 17, at 135 (“[Laura] was angry at being abandoned just when she was going to have a baby. It was hard for her to put into words, but Butch was repeating the pattern of her own father deserting her. After the murders, something in Laura changed. It was as if an icicle formed inside her, freezing her fragile emotional system.”); *cf.* MILLER, FOR YOUR

In route to giving the world “bad boys,” neither Aaron nor Laura realized that they were living out as adults the trauma they had suffered as children.<sup>127</sup> In effect, their childhoods had unconsciously informed their adult experience. Given that neither healed from their cruelty as love experience, they took that poisonous pedagogy to their graves. Yet, by pouring their rage and resentment into their children, Aaron and Laura distorted their children’s perception of reality, making them believe that only through rage and resentment could their needs be met.<sup>128</sup> Although I speculate that Aaron must have relied on obedience training and rigid physical violence to raise Pud and siblings,<sup>129</sup> Butterfield documents that Laura violently beat Willie James. Having a hard time controlling him, Laura sometimes “slapped him around with her hand until the veins popped out or she would give him a whipping with a belt.”<sup>130</sup> Eventually, psychiatrists diagnosed Willie James as having “antisocial personality disorder.”<sup>131</sup>

Accordingly, Willie James did not become a “bad boy” with an antisocial personality because Butch had been a criminal. Rather, Butch and eventually Willie James became antisocial personalities because they suffered severe neurosis due to their childhood maltreatment.<sup>132</sup> First, Butch was maltreated by Marie, his mother, who eventually abandoned him. Later, his grandmother, Frances, took him to New York City where Marie had remarried and had four children.<sup>133</sup> After suffering beatings from Marie and her new drunken husband, she eventually kicked him out, giving him a new set of cloth-

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OWN GOOD, *supra* note 27, at 72 (“A child cannot acknowledge the negative sides of his or her [mother], and yet these are stored up somewhere in the child’s psyche, for the adult will then be attracted by precisely these negative, disavowed sides in the [mother] substitutes he or she encounters. An outsider [like Butterfield] has trouble understanding this.”).

127. See MILLER, FOR YOUR OWN GOOD, *supra* note 27, at ix (“The memory of the body underlies the mystery of the compulsion to repeat, especially the compulsion of so many adults to repeat with their own children what they endured very early in life but do not recall.”).

128. See *id.*

129. Cf. HOOKS, *supra* note 125, at 23 (“At times this meant teaching habits of being that were not rooted in love. To break someone’s spirit is not a gesture of love. It can and often does lead to what contemporary psychoanalysts have called ‘soul murder.’”).

130. BUTTERFIELD, *supra* note 17, at 143; see MILLER, FOR YOUR OWN GOOD, *supra* note 27, at ix (“The typical mother who ‘involuntarily’ slaps her child is not aware of the fact that her body and its memory is prompting her to do so. But [by understanding it, she can] cope, rather than repeat, endlessly and helplessly, a behavior that harms all involved.”).

131. BUTTERFIELD, *supra* note 17, at 178.

132. *Id.* (“Three years earlier, Willie had been a sad, frightened, suicidal eight-year old, still soft and open. Now he had been transmogrified into an angry, hostile, homicidal eleven-year-old whom no one could reach. That was how fear worked in some very scared children, she thought. They were so frightened you might kill them that they turned into dangerous people themselves, always ready to attack, making everyone into an enemy.”).

133. *Id.* at 88.

ing and money as parting gifts.<sup>134</sup> Second, Butch eventually lived with his father in New York City for a time. While drunk and depressed, he beat Butch severely.<sup>135</sup> Third, after Marie initially abandoned Butch, he was raised reluctantly by Frances, his grandmother. At a very young age, Butch was filled with rage and resentment and Frances responded not with love and tenderness but with a demand for morality and performance, which she undergirded with brutal beatings, thus effectively rejecting any role as her grandson's "helping witness."<sup>136</sup> One symbolic example of rage was Butch's truancy. Frances could not fathom this behavior. In a moment of psycho-existential insight, Butterfield ventures that Butch "had been neglected and rejected by his father and mother, and he burned with an inner rage. Skipping school was a way to demonstrate his anger."<sup>137</sup> If so, then Butch's behavior had little to do with him inheriting Pud's and James's need to demand respect at the point of a knife. Rather, his rage-based behavior came from traumatic beatings. Frances, who may not have been that existentially reflective, thought that beating Pud's and James's evil out of them would prove corrective medicine.<sup>138</sup> Finding Butch hiding under the steps to the house, she demanded that he come out. She prepared a "switch out of a big branch of the tree in the backyard." She beat him, while saying: "Boy, why you so bad? You ain't going to school."<sup>139</sup> Of course, Butch lied. Frances continued: "No, you ain't. You got the devil in you, just like your granddaddy and your daddy."<sup>140</sup> She continued to beat him.<sup>141</sup> Despite her best intentions and her rigid violent discipline, Frances was powerless to alter Butch's "evil" conduct,<sup>142</sup> which she more than likely deep-

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134. *Id.* at 89.

135. *Id.* at 88.

136. ALICE MILLER, *THE TRUTH WILL SET YOU FREE: OVERCOMING EMOTIONAL BLINDNESS AND FINDING YOUR TRUE ADULT SELF* x (2001) [hereinafter MILLER, *THE TRUTH WILL SET YOU FREE*] ("A *helping witness* is a person who stands by an abused child (consistently or occasionally), offering support and acting as a balance against the cruelty otherwise dominant in the child's everyday life. This can be anyone from the child's immediate world: a teacher, a neighbor, a caregiver, a grandmother, often a sibling."); see also MILLER, *BANISHED KNOWLEDGE*, *supra* note 36, at 7 ("By 'potential helpers' I mean all those who do not shrink from unequivocally taking the side of the child and protecting him from power abuse on the part of adults.").

137. BUTTERFIELD, *supra* note 17, at 82.

138. Cf. Bracey, *supra* note 22, at 109 ("Overall, spanking appeared to happen rarely to almost never in this family, despite the acceptance of it as a valued discipline strategy.").

139. BUTTERFIELD, *supra* note 17, at 82.

140. *Id.*

141. *Id.*

142. *Id.* On this point, Butterfield writes:

ened into darker rage and resentment, thus morphing an intelligent child into a “bad nigger,” antisocial personality, who was eventually convicted of double homicide.

Such “bad niggers” undermine the stability of the black family. For example, James, the grandfather of Willie James, Jr., abandoned his family.<sup>143</sup> Before he left his wife, Marie, and his son, he beat her black and blue.<sup>144</sup> He attempted to kill her while in a drunken stupor.<sup>145</sup> After Marie had abandoned her abusive husband and child, James, having dishonorably discharged from the army, returned home to live with his mother and his son, Butch, and after drinking, he beat Butch as if he were a disobedient slave.<sup>146</sup> Seeking greater support for their child, and alleging that James was “excessively cruel and abusive,” Marie went to Juvenile Court.<sup>147</sup> In order to avoid directly supporting his child, perhaps because he viewed whites and their law as interfering in his family privacy,<sup>148</sup> he left town rather than face a support order from a white court.<sup>149</sup> Faced with ongoing difficulty in supporting herself and her son, Butch, Marie left her son with Frances, James’s rather controlling mother.<sup>150</sup> She promised to return after she prepared a meal. She did not. Rather, Marie found her way to Chicago, thus abandoning her son to Frances for several years. During these years, Butch suffered greatly because Frances worked as a maid.<sup>151</sup> He was always hungry, answering his pang by begging for money or doing odd errands. It was at two-years-old that he realized that he could not rely on Frances, his caregiver, to meet his basic

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Frances sensed she was powerless to stop Butch from playing hooky and stealing; even her regular whippings, administered with the best of intention, failed to produce the desired conversion. Instead, they only seemed to harden Butch and prepare him for life on the street. If he could tolerate the pain of the beatings with sticks and belts, he could face the danger of fights with older boys in the neighborhood.

*Id.* at 83.

143. *Id.* at 86.

144. *Id.* at 78 (“Alcohol also made James violent. ‘He would beat me, with his fists, ’til I was black and blue,’” Marie recalled.”).

145. *Id.*

146. *Id.* at 86 (“A few nights when he had been drinking, he beat Butch savagely with a belt, leaving scars on his back. It was like the mark of slavery. The Boskets had been whipped for so many years as slaves, it seemed as if now they couldn’t stop repeating the cruelty.”).

147. *Id.* at 78.

148. *Id.* (“From James’s point of view, it was the worst nightmare. The court, the white man’s court, was now interfering in his private life.”).

149. *Id.*

150. *Id.* (“Frances was strict about making everyone contribute a share of the household expenses. On payday, she stood on the porch, waiting for James and Marie to come home, and always took half their wages.”).

151. *Id.* at 80 (“Butch grew up an orphan. . . . Frances was out most days, working as a maid. . . . It brought in a little more income, but there was no one to watch the little boy.”).

needs.<sup>152</sup> By the time he was two-years-old, Butch's eyes revealed a deep hurt and repressed anger.<sup>153</sup> Unfortunately, Butterfield accepts James's decision to abandon his wife and child.<sup>154</sup> He does not note that Marie invoked the State's *paren patriae's* interest,<sup>155</sup> however white it may have been.<sup>156</sup> Equally unfortunate, Butterfield does not declare that James had a moral and legal duty to act in his child's best interest.<sup>157</sup> By focusing on the whites as the socialized other, he buttresses James's decision by arguing that he feared white law and white courts, over which he—as a black man and like his father Pud—had no control.<sup>158</sup> Without James, the Bosket family would face new, greater instability.<sup>159</sup> Without Marie, whose abandonment of Butch was perhaps instigated by James's departure and by her still young need to be freer,<sup>160</sup> Butch and his grandmother faced greater instability within the Bosket's extended family. At this juncture, the instability that had been cloistered within the nuclear relationship of James, Marie, and Butch now becomes public, even if blacks had relied upon kinship networks<sup>161</sup> to ensure not only the adaptation but also the survival of the black family.<sup>162</sup> At the very least, especially in light of

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152. *Id.* at 80-81.

153. *Id.* at 80 (“A black-and-white picture of Butch as a two-year-old shows a husky, rugged, strong-looking boy. His face was square, his expression tense and unsmiling. There is a hurt and anger blazing in his eyes.”).

154. *Id.* at 79.

155. *Id.* at 78 (“In the clinical language of the court report, ‘The parents were temporarily reconciled, but within a few weeks the mother again appeared requesting support. When a two-dollar weekly order was imposed, the father deserted and left the state.’”).

156. *Id.* at 78 (“From James's point of view, it was the worst nightmare. The court, the white man's court, was now interfering in this private life.”); *id.* at 79 (“So strong was the perception that the white man's court was bound to be unfair that James Bosket calculated he was truly outside the law, just as white Southern cavaliers reckoned they were above the law in the antebellum period.”).

157. *Id.* at 79 (“James felt he was trapped, and now he did the only thing he figured a man could do, unless he was willing to go to jail—he left town.”).

158. *Id.* at 78-79 (“After all the stories he had heard about his father [Pud] being arrested, tried, and put on the chain gang, he was determined to avoid the clutches of the law.”).

159. *Id.* at 80 (“Butch grew up an orphan of Ninth Street. Frances was out most days, working as a maid, a job she had graduated to from laundress. It brought in a little more income, but there was no one to watch the little boy.”).

160. *Id.* at 77 (“[M]arriage represented a giant step forward. It meant [Marie] was an adult, and she relished the freedom from the demands of helping out at home. She had older friends who had gotten married, and they told her she would be able to stay out late and do whatever she wanted. If things didn't work out, she could get a divorce, just like they did.”).

161. *Cf.* FRANKLIN, *supra* note 24, at 12 (“African-American slaves developed independently with distinctive kin and family arrangements that fostered a new culture of social and communal obligations, which provided the social basis for the African-American community over time and across space.”).

162. *See* Christine Barrow, *Contesting the Rhetoric of “Black Family Breakdown” from Barbados*, 32 J. COMP. FAM. STUD. 419, 423 (2001) (“Adopting the central theme of the ‘adaptive



Butch's need of his father and mother,<sup>163</sup> another generation of Boskets faced family instability.

Ignoring emotional and physical maltreatment, which clearly James, Butch, and Willie James suffered, Butterfield argues that during and since slavery, white society preordained Willie James.<sup>164</sup> Hence, the soul-poisoning, humiliating sustenance served by masters to slaves has continued to be consumed by blacks not only in Jim Crow but also into black life today.<sup>165</sup> In effect, Willie James did crawl from the primordial soup of a befouling West African culture, which was instilled in the American way of black family life during slavery. Rather, blacks like Willie James owe their existence to racial oppression. As race critics would say, the confluence of race, racism, and power<sup>166</sup> construct the oppressive worlds of blacks, so that black life suffers moment-to-moment in a world not of their own making.<sup>167</sup> If so, then does it follow that the trauma of the middle passage, the brutality of slavery, the violent terrorism of Jim Crow, the humiliation of modern discrimination, the shameful incompleteness of the civil rights movement, and the oppressive, historic origins of trenchant

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survival strategies', they explored a range of dynamic mechanisms adopted to cope with environmental conditions of chronic unemployment, economic insecurity and poverty. These strategies were interpreted as evidence of strength and resilience in black family life and included, for example, flexible conjugality, child shifting, extended family support networks and active kinship.") (citation omitted).

163. See BUTTERFIELD, *supra* note 17, at 96. Butterfield's research strongly suggested that Butch needed his mother. He writes:

Another of Butch's favorites was *The Wonderful Adventures of Nils*, a classic Swedish children's novel that Kramer had read in German as a girl and retold to her students. It was about a naughty boy who is changed into an elf because he cares only for himself; he ends up traveling with a band of geese, led by a wise old female goose named Akka. Nils is the main character in the book, but Butch thought the real hero was Akka, the mother figure he desperately needed. "Talk about Akka, tell us about Akka," he would beg his teacher.

*Id.*

164. See, e.g., *id.* at 63 ("All this violence was not simply pathology. It grew out of the old white Southern code of honor, an extreme sensitivity to insult and the opinion of others.").

165. Cf. Gwen Ifill, *Black. America. Today.*, WASH. POST, Oct. 2, 2011, at B01 ("'Racism is the act of shaming others based on their identity. . . . Blackness in America is marked by shame . . . . Shame makes us view our very selves as malignant. But societies also define entire groups as malignant. Historically the United States has done that with African Americans.'") (quoting MELISSA V. HARRIS-PERRY, *SISTER CITIZEN: SHAME, STEREOTYPES, AND BLACK WOMAN IN AMERICA* (2011)).

166. See KIMBERLÉ WILLIAMS CRENSHAW ET AL., *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED A MOVEMENT* xiii (Kimberlé Williams Crenshaw et al. eds., 1995) (showing that Race Critics wish to understand how through race, racism, and law the "subordination of people of color was created and maintained.").

167. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation of Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1357 (1988).

poverty explain the extant instability of the black family?<sup>168</sup> After all, “bad niggers” like Willie James not only impact people who they target, but they also cause instability for black parents, especially when intelligent men like Butch, who are burdened by his antisocial personality disorder, commit crimes and face imprisonment, which means they cannot support their families.

In the end, Butterfield penned a powerful, biographical narrative of Willie James Bosket’s violently criminal life. Beginning with the American Revolution and slavery, he draws on socio-historical context to ground the criminal wildings of several generations of Boskets, thus hoping to explain why Willie James hurt and killed others.<sup>169</sup> Although Butterfield’s analysis strongly considers absent fathers, urban poverty, and Laura’s emotional distance, all perhaps representing the Moynihan thesis with a twist, he greatly emphasized two key factors to explain Willie James’s violent, criminal penchant: the “respect” code *and* an impulsiveness “gene.”<sup>170</sup>

Yet, I assert that by emphasizing these factors, Butterfield projects what Miller called “emotional blindness”<sup>171</sup> onto Pud, James, Marie, Butch, Laura, and ultimately Willie James, so that he—and thus they—can formally bracket parents and their cruelty as love from fault and criticism.<sup>172</sup> By so doing, Butterfield effectively argues that the cruel maltreatment of obedience training and rigid physical violence, which was obviously present in every generation of Boskets,

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168. See generally Heiss, *supra* note 9, at 92 (concluding that immediate prior generation transmission of instability “is not the key to the high rates of marital instability among blacks”). If Heiss’ conclusion is valid, then it would suggest that perhaps instability within black families is more correlated with or caused by obedience training and rigid physical violence because they can cause not only malformation of the prefrontal cortex and the hyperactivity of the amygdala, which unconsciously leads adults who were maltreated as children to project their need for love or fear of a socialized other onto their potential spouses or lovers, and vice versa.

169. See BUTTERFIELD, *supra* note 17, at xv. While hoping to get a clearer biography of Willie James’ father, Butterfield soon learned about his grandfather, too. *Id.* (“[I] discovered that his grandfather, too, had a criminal record, and that his great-grandfather was a legendary badman at the turn of the century. . . . Little did we imagine that the story could be traced back to slave times before the Civil War and then, eventually, all the way back to the American Revolution.”).

170. See MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 24 (“[E]very murder committed not directly in self-defense but on innocent surrogate objects is the expression of an inner compulsion, a compulsion to avenge the gross abuse, neglect, and confusion suffered during childhood and to leave the accompanying feelings in a state of repression.”).

171. See *id.* at 37 (“It is the consequence of a repression of feelings and memories that renders a person unable to see certain sets of circumstances.”).

172. See *id.* at 2-3 (“[Maltreated parents] will not remember the torments to which they were once exposed, because those torments, together with the needs related to them, have all been repressed: that is, completely banished from consciousness.”).

cannot be the prime cause of successive generations of self-annihilating behavior and social violence.<sup>173</sup> Unfortunately, recent literature on childhood maltreatment, including severe and very severe violence, argues that while maltreatment cannot perforce doom a child to a violent sociopathic life, obedience training coupled with rigid physical violence can destroy a child's vitality, spontaneity, and authenticity.<sup>174</sup> Thus without a helping witness, to whom a maltreated child can turn for love and tenderness, this destruction can strongly shift the child from what Miller calls, a "victim to a destroyer."<sup>175</sup>

For Miller, destroyers reveal themselves from the stones onto which parents chiseled their childrearing styles. Those styles require strict obedience to, and absolute respect of, their parents.<sup>176</sup> Along the way, such children learn that they must remain in their proper place like a catfish in its mudhole.<sup>177</sup> They equally learn that without apparent provocation, parents and caregivers will strike them, beat them brutally, and never explain why.<sup>178</sup> To the extent that these children suffer brain lesions,<sup>179</sup> they will react with apparent impulsive-

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173. *But see* MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 13 ("It is in fact true that over the years children forget everything that happened to them in early childhood; 'they will never remember afterwards that they had a will'—to be sure. But, unfortunately, the rest of the sentence, 'the severity that is required will not have any serious consequences,' is *not* true.")

174. MILLER, FREE FROM LIES, *supra* note 81, at 32-33. Borne out of the maltreatment of a person's childhood history, depression "is the suffering caused by the separation from one's own self, abandoned early on, never mourned for, and accordingly doomed to despair and death." *Id.* "It is as if the body used depression as a form of protest against this self-betrayal, against the lies and the dissociation of genuine feelings, because authentic feelings are something it cannot live without. It needs the free flow of emotions in constant flux: rage, grief, joy." *Id.*

175. *See generally id.* at 47-89 (arguing that parents don't give birth to evil children who are genetically predisposed to engage in extremely destructive behavior; rather, parents don't model trust, love, and tenderness during their children's formative years). Miller further argues:

The result is that these children will tend to glorify the violence inflicted upon them and later take advantage of every opportunity to exercise such violence, possibly on a gigantic scale. Children learn by imitation. Their bodies do not learn what we try to instill in them by words but what they have experienced physically. Battered, injured children will learn to batter and injure others; sheltered, respected children will learn to respect and protect those weaker than themselves. Children have nothing else to go on but their own experiences.

*Id.* at 48.

176. *See* Ellis, *supra* note 5, at 48.

177. *See* LITWACK, *supra* note 64, at 4.

178. *See* Ellis, *supra* note 5, at 48 (explaining that Ga children treat their parents as if they are Gods, they believe that they have no right to question them about anything, and they believe that when their parents beat them, they have been bad and need to be corrected).

179. *See, e.g.,* deMause, *supra* note 13, at \*12. According to neurobiologists, our brains have two neural circuitries to help us regulate and cope with fear. They are prefrontal cortex (the regulator) and the amygdala (the fear system). When infants suffered maltreatment from their caregivers, their brains release cortisol, which shuts down their prefrontal cortex and hyperactivates their amygdala—all of which "indelibly imprinting, burning in" the memory of a threatening father, mother, or caregiver. Such cortisol leaves the prefrontal cortex scared and smaller in size,

ness.<sup>180</sup> As such, Butch and Willie James's violent, sociopathic behavior finds its origins not perforce in white racism, white structural oppression, or violent, absent fathers, but more than likely in obedience training and rigid physical violence.<sup>181</sup> And when such parents conjoin such childrearing practices with humiliation, manipulation, and neglect, they grow children like George Bush, Sr. and Jr., Muammar Gaddafi, Willie James, Ken Lay, Robert Madoff, Hosni Mubarak, Robert Mugabe, etc.,<sup>182</sup> all of whom waged actual and symbolic wars against human beings purely for personal and financial gains.<sup>183</sup> Hence, we must examine how obedience training and rigid physical violence affect families, especially their ability to form healthy, nurturing, and interdependent relationships.<sup>184</sup> Yet, if such relationships are forged not on love and tenderness, but on morality and perform-

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which gives them an inability to control their fears, rage, anger, and resentment. This inability affects all present and especially later human relationships. In the traumatized child, the amygdala is always "on," and as LeDoux puts it, "[fears and traumas] are probably with us for life." *Id.*

180. *Id.*

181. See, e.g., BUTTERFIELD, *supra* note 17, at 82 ("When [the police] brought Butch back [from overnight jail where they hoped to scarce him], Frances would beat him again, 'with anything she could get her hand on that wasn't too big,' Annie Diggs said. 'She'd lay into him, and then you'd see him come flying out of the house. She was awfully mean to that boy.'").

182. See MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 61. According to Miller, people like George Bush, Sr. and Jr., Muammar Gaddafi, Willie James, Ken Lay, Robert Madoff, Hosni Mubarak, Robert Mugabe, etc., will seek out others like foreign enemies, different ethnic or religious groups, or workers reduced to balance sheet entries because they need an appropriate proxy or substitute so that they can discharge their rage, anger, hatred, and resentment. *Id.* Miller states:

It is inconceivable that they are able to express and develop their true feelings as children, for anger and helpless rage, which they were forbidden to display, would have been among these feelings – particularly if these children were beaten, humiliated, lied to, and deceived. What becomes of this forbidden and therefore unexpressed anger? Unfortunately, it does not disappear, but is transformed with time into a more or less conscious hatred directed against either the self or substitute persons, a hatred that will seek to discharge itself in various ways permissible and suitable for an adult.

*Id.*

183. See, e.g., PAUL BABIAK & ROBERT D. HARE, SNAKES IN SUITS: WHEN PSYCHOPATHS GO TO WORK xiv (2006) ("[P]sychopaths do work in modern organizations; they often are successful by most standard measures of career success; and their destructive personality characteristics are invisible to most of the people with whom they interact. . . . They abuse coworkers and, by lowering morale and stirring up conflict, the company itself. Some may even steal and defraud."); BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON (2005) (discussing the early, impoverished life of Ken Lay and his father, a business man and minister, who was perhaps always gone and unavailable to meet his needs).

184. See MAGID & MCKELVEY, *supra* note 34, at 285-86 (discussing the high and low risk factors that would indicate if poor attachment presented for a child who could not bond and shadow a primary caregiver, thus suggesting that a child would not form healthy, nurturing relationships).

ance,<sup>185</sup> then the mother-son love<sup>186</sup> becomes mere patina to the seething dysfunction that truly exists,<sup>187</sup> in which sons love and hate their mothers.<sup>188</sup> Working backwards, I would argue that Willie James' criminal acts flow inexorably from family instability, and such instability exists for at least three reasons. First, black parents like Laura could not form healthy attachments to their children. Second, such parents may have been traumatically brutalized or abusively neglected and thus never had consistent modeling of healthy bonding with their parents. Third, such parents, having suffered brutality or neglect, may in turn be positively predisposed to using obedience training and rigid physical violence on their children.<sup>189</sup> Thus, it becomes a vicious intergenerational cycle.

## II. "BLINDED" SCHOLARS AND BLACK FAMILY INSTABILITY: ANALYSES THAT MUST NEVER FAULT WELL-MEANING PARENTS

In *All God's Children*, Butterfield, like most sociologists, cannot fault parents, especially if they have become convinced that slavery,

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185. See MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 85 ("Morality and performance of duty are artificial measures that become necessary when something essential is lacking. The more successfully a person was denied access to his or her feelings in childhood, the larger the arsenal of intellectual weapons and the supply of moral prostheses has to be, because morality and a sense of duty are not sources of strength or fruitful soil for genuine affection.")

186. See also RACHEL VASSEL, DAUGHTERS OF MEN: PORTRAITS OF AFRICAN-AMERICAN WOMEN AND THEIR FATHERS (2009) (showing—through photographs and interviews—how African American women attribute much of their own success to the relationships they had with their fathers); cf. MICHAEL ERIC DYSON, WHY I LOVE BLACK WOMEN (2003) (explaining love for African American women and how African American women affect all relationships).

187. See, e.g., J.L. KING, ON THE DOWN LOW (2004) (discussing relationships within the black community).

188. See, e.g., BUTTERFIELD, *supra* note 17, at 143.

189. See *id.* at 147. After Dr. Mahin Hassibi, the psychiatrist in charge of the children's unit at Bellevue Hospital had examined Willie James, and she concluded that he'd been abused, "which was why he was so depressed and suicidal." *Id.* Specifically, she meant: "Not physically abuse necessarily, but an abused, neglected child." *Id.* After Dr. Hassibi met with his mother, Laura, to explain what she'd understood, she was more upset. *Id.* She explained: "Willie was very sad and might try to hurt himself." In response, Laura declared: "I'll beat the craziness out of him." *Id.*; cf. STELLA CHESS & MAHIN HASSIBI, PRINCIPLES AND PRACTICE OF CHILD PSYCHIATRY 282 (1986) ("[T]he pediatrician noticed that John talked incessantly and made little sense. A psychiatric consultation was requested. John's mother greeted the psychiatrist by stating, 'John better not be crazy, or I will beat the craziness out of him.' . . . [John's mother had been hospitalized] because she had become violent and agitated. . . . [John] then began to relate a story about . . . wanting to kill his mother 'so she can come back as a nice person.'"); Bracey, *supra* note 22, at 109 (explaining that if a black child had a down or funky attitude, both black parents would beat him because no child is permitted to have a mood or feeling that offends the parents' qua parents such a mood, especially if they have attempted to lighten it, must originate in something dark or evil).

Jim Crow, and white racism effectively explain why we must cope with antisocial personalities like Willie James. This liberal argument effectively sums up as follows: slavery, Jim Crow, and white racism remain historical evils that cultivate in oppressed people, like blacks, life-destroying and pathological practices that create blacks like Willie James. Although this argument has its appeal, it credits slavery, Jim Crow, and white racism too much.<sup>190</sup> And so in this short Article, I invite the reader to consider white racism, and then to hold it in abeyance, thus creating intellectual space for asking how black parents contribute to the personality of children like Willie James. If white parents can affect their children developmentally, are black parents equally capable of relying on parenting styles that negatively impact their children, thus causing a shock wave that has consequences for educational outcomes, employment opportunities, etc.? Of course, the answer must be yes. When authors like Butterfield and sociologists refuse to fault them, they unconsciously confess that they remain affected by what Alice Miller called “emotional blindness,” except in this instance they become “blinded” scholars.<sup>191</sup>

As one such blinded scholar, Butterfield argues principally that external, structural forces, albeit amplified by well-intentioned but ineffective parenting,<sup>192</sup> gave birth to Willie James’ pathological violence. To this degree, he gives great weight to external, structural forces when he exhumes the biographical bones of Willie James. Unfortunately, Butterfield stands in good, well-educated company when he argues that things and circumstances, thus external forces largely

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190. See, e.g., PATTERSON, *supra* note 18, at 147 (showing that Glen Loury, the first black economist to garner tenure at Harvard, argued that “too much of the political energy, talent, and imagination abounding in the emergent middle class being channeled into a struggle against an enemy without, while the enemy within [‘family instability and crime’] goes relatively unchecked.”).

191. See MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 61 (“I must limit myself to stressing how important it is that we all be aware of the effect of the commandment to refrain from placing blame on our parents. This commandment, deeply imprinted in us by our upbringing, skillfully performs the function of hiding essential truths from us, or even making them appear as their exact opposites. The price many of us pay for this is severe neurosis.”); MILLER, BANISHED KNOWLEDGE, *supra* note 36, at 96-97 (“Accusation against parents are often associated with mortal fears, not only because of real threats but because a small child feels he is in deadly danger if he loses the love of the person closest to him.”).

192. BUTTERFIELD, *supra* note 17, at 143 (“Laura herself despaired. She was trying to be a good mother. But she honestly didn’t know what else to do.”). See *id.* at 149 (“Laura’s worst fears seemed to be coming true. She was doing the best job she could, given a difficult situation, and it never seemed enough. And now Willie [who was heading to Wiltwyck as Butch had done before him] was turning out just like his father.”).

not of Willie James' own making, have victimized blacks like him.<sup>193</sup> Even noted scholars like William Julius Wilson arguably agree that while culture matters, we must look principally to external, structural forces, which have caused the economic woes that would have contributed to Laura's distress and ability to guide her son from the straits of lawless self-annihilation.<sup>194</sup> Although cultural dynamics played a role, we can best understand, as some might argue,<sup>195</sup> why Willie James embraced a violent life by looking to the cold bosom of poverty and the hard slaps of urban plight into which blacks like Willie James were born.<sup>196</sup>

Yet, despite this tension between interpersonal dynamics and external, objective forces and their power to structurally pose blacks against their inherent interest and well-being,<sup>197</sup> we must begin to redress how black parents, especially females,<sup>198</sup> who pay homage to their cultural legacy and elder worship, slowly and steadily destroy their children through obedience training and rigid physical vio-

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193. See generally FRAZIER, *supra* note 3 (discussing the history of African American families).

194. Cf. WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 70-93 (2009) (explaining social and racial inequalities of black males). On this point, Wilson argues:

[S]tructural explanations of concentrated poverty in the inner city have far greater significance than cultural arguments, even though neither should be considered in isolation if we are seeking a comprehensive understanding of racial inequality because structural and cultural forces often interact affecting the experiences and chances in life of particular racial group members . . . . [S]tructural and cultural forces jointly restrict black male progress in some situations.

*Id.* at 93.

195. See, e.g., FRAZIER, *supra* note 3, at 170 ("It is not strange that people with such a racial background should have considered themselves a different race from the mass of the Negro population.").

196. *But see* GLENN DAVIS, *CHILDHOOD AND HISTORY IN AMERICA* 258 (1976) (noting that Lloyd deMause's psychogenic framework rightfully repositions Georg W.F. Hegel back atop Karl Marx's material dialecticism because psychic leaps better exclaim the movement of history than does material conditions).

197. See generally Reginald Leamon Robinson, *Critical Race Theory: History, Evolution, and New Frontiers Human Agent, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 AM. U. L. REV. 1361, 1369 (2004) (arguing against the socially constructed view, especially as propounded by Critical Race Theory, that human beings don't have sufficient power to engage in purposeful, rational action, so that they have power through core beliefs that create and co-create their personal experiences and social realities).

198. See generally Bush, *supra* note 80 (explaining the relationships between black women and their sons). Bush noted:

[T]he following related conditions make the study of Black mother-son relationships unique: (a) 50% of all Black households with children under age 18 are headed by Black women, (b) Black women are held responsible in some academic literature and in the popular press for Black males' maladaptive characteristics and behaviors, and (c) catastrophic conditions exist that cause some observers to view Black men as an endangered species.

*Id.*

lence.<sup>199</sup> Along the way, such children internalize so much hate, rage, and resentment,<sup>200</sup> while ever hopeful that they would actually get love from their parents and feel safe at home,<sup>201</sup> that in their realized hopelessness they strike back by becoming criminals,<sup>202</sup> in many instances, because they need innocent proxies through whom they can give proper vent to their soul-murdering experiences.<sup>203</sup> In my view, soul-murdering experiences follow naturally from obedience training and rigid physical violence, regardless of socio-economic status,<sup>204</sup> unless a helping witness exposes maltreated children to love and tenderness. As such, Laura's poverty, urban living, and Butch's criminal conduct cannot clearly be necessary and sufficient conditions to turn Willie James into one of New York's infamous young criminals.<sup>205</sup>

According to Butterfield, infamous, young criminals like Willie James, including Butch, James, and Pud who preceded him, grow out of slavery and its legacy, including the present effects of past discrimination, some examples of which are marginal education and poor

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199. Cf. MILLER, *FREE FROM LIES*, *supra* note 81, at 50 ("Hitler's henchmen were victims of their upbringing. They belonged to a generation of children who had been exposed to brutal physical correction and humiliation and who later vented their pent-up feelings of anger and helpless rage on innocent victims.").

200. See BUTTERFIELD, *supra* note 17, at 107. The prison psychiatrist, Dr. Leonard J. Bolton wrote: "[Butch] has been subjected to a pathologic environment, an indifferent father who is an alcoholic and mentally disturbed. . . . It is clear this youth, resentful and hostile, has turned his resentfulness and hostility against the world. His behavior is a dramatization of his feelings." *Id.*

201. *Id.* at 177 ("'I'm not crazy,' Willie said as he surrendered. 'I just wanted to get out of here and go home.'").

202. See MILLER, *FREE FROM LIES*, *supra* note 81, at 51 ("Evil exists. But it is not something that some people are born with. It is produced by society, every day, every minute, incessantly, all over the world. It starts with the treatment meted out to newborn babies, and it carries on in the parenting methods practiced on small children. Such children may *become* criminal at a later stage, if they have no 'helping witness' to turn to.").

203. See, e.g., BUTTERFIELD, *supra* note 17, at 115 ("When [William Locke] saw [David] Hurwitz shouting at Butch and trying to push him out of the [pawn] shop, Locke had come over to help. He was grabbing at Butch's arm. Butch stabbed him, too. He drove his knife into Locke's chest six times in rapid succession, like a machine gun firing. One of the blows—it was impossible later to tell which one—went right into the center of Locke's chest and punctured his heart.").

204. See Hampton & Gelles, *supra* note 30, at 25 ("Among black children aged two to six years, 84 percent experienced at least one act of violence each year."). On this point, Hampton and Gelles point out:

Projecting the rate of very severe violence toward black children (40 per 1,000) to the 9.4 million black children in the United States in 1985 yields an estimate of 379,000 severely assaulted children per year. Applying the rate of very severe violence *ever experienced* by black children yields an estimate of 480,000 very severely assaulted children. Using the broader measure of abuse, the severe violence measure, which includes hitting or trying to hit with an object, yields estimates of 1.86 million severely abused children each year.

*Id.* at 25-27.

205. See BUTTERFIELD, *supra* note 17, at 190.



housing and employment opportunities. By making this argument, Butterfield invites us to either accept or to critique this proposition. In this Article, I reject Butterfield's hypothesis, and I argue that by viewing Willie James through Alice Miller, Arthur Janov, and Glenn Davis's frameworks, it is the psychogenic relationship of caregiver to child that will determine how children, and later adults, understand their experiences and realities,<sup>206</sup> especially if such children cannot experience real love and tenderness through helping witnesses. Without this degree of love and tenderness, maltreated children like Willie James can become anti-social types, criminals, serial killers, or dictators.<sup>207</sup>

Since the late 1800s, few scholars and sociologists really understood the origins of instability in the black family.<sup>208</sup> First, they fault economic exploitation and its resulting impact on black males to earn living wages to support their families. Without living wages, blacks did not marry at the same rate as whites.<sup>209</sup> They thus favored cohabitation. They had out-of-wedlock children. For example, in 1940, two percent of unmarried white women bore children.<sup>210</sup> By 1965, that number had rose to four percent.<sup>211</sup> "By contrast, the proportion among blacks had been 17 percent in 1940, increasing to 18 percent in 1950 and 22 percent in 1960 – and more rapidly to 25 percent in 1965."<sup>212</sup> In short, white structural forces, which were external, objec-

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206. See, e.g., MILLER, *FOR YOUR OWN GOOD*, *supra* note 27, at ix ("And corporal punishment [which means spanking too] includes the effects of all other forms of child abuse: betrayal of the child's confidence, dignity, and perception of reality.").

207. See MILLER, *FREE FROM LIES*, *supra* note 81, at 51 ("Such children may become criminals at a later stage, if they have no 'helping witness' to turn to. As I have said, there is no trace of such helping witnesses to be found in the childhood of dictators and serial killers.").

208. See, e.g., W.E.B. DU BOIS, *THE PHILADELPHIA NEGRO: A SOCIAL STUDY* (1899). Billingsley's adopted a more structural dependency argument, which expands Frazier's, and thus Moynihan's thesis; he argues that "various structural adjustments that Black families make in response to economic imperatives [threaten] their ability to provide for family member needs. The idea of differential susceptibility to economic and social discrimination is integral to Billingsley's argument; thus, more severe resource limitations cause low-income Black families to display higher rates of disorganization than middle- and upper-income Black families. . . . [Hence, when these lower-class families abandon traditional or upper-class values, they ought to be viewed] as valid, sensible adaptations to the attendant circumstances of racial and economic oppression. See, e.g., Walter R. Allen, *African American Family Life in Societal Context: Crisis and Hope*, 10 *SOC. F.* 569, 577-78 (1995).

209. See Steven Ruggles, *The Origins of African-American Family Structure*, 59 *AM. SOC. REV.* 136, 147 (1994) ("[T]he high incidence of single parenthood and children residing without parents among blacks is not new. The pattern is clearly evident as far back as 1850 among free blacks.").

210. PATTERSON, *supra* note 18, at 37.

211. *Id.*

212. *Id.*

tive realities, denied blacks, especially males, equal access to living wages, all of which had disastrous effects on the stability of the black family.<sup>213</sup>

Second, they assert that slavery, Jim Crow, and their legacy destroyed African culture, which devastated positive cultural transitions.<sup>214</sup> In other words, slavery damaged black family life. Scholars like Stanley Elkins argue that slavery shattered African and black slave culture.<sup>215</sup> They could not legally marry. If they were master-married, neither “spouse” could assert rights, which if trammled by the master, could be reinstated by a court.<sup>216</sup> Furthermore, as chattel, neither “spouse” had access to courts. Without such legal recognition, masters could, and did, interfere with cultural norms with the black family that permitted fathers or mothers to properly discipline their children.<sup>217</sup> Moreover, masters could lawfully sell any slave, regardless of its impact on the stability and structure of the black family.<sup>218</sup> Although masters preferred blacks to marry other blacks on the same plantation, “abroad” black husbands existed, and such husbands preferred this arrangement so that they would not have to watch helplessly as their wives were disrespected, beaten,<sup>219</sup> or put upon for sexual favors.<sup>220</sup> To insure that the plantation’s wealth increased, masters ordered blacks to cohabit and to reproduce a child, even if she did not want to have a sexual union with her chosen “lover.”<sup>221</sup> By the by, such external, objective forces had lingering effects, which

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213. See generally *id.* (discussing the impact of Moynihan’s Department of Labor report, *The Negro Family*, and how it urged the federal government to take the lead on dealing the forces that caused the pathologies within the black family).

214. *Id.* at 37.

215. See generally STANLEY ELKINS, *SLAVERY: A PROBLEM IN AMERICAN INSTITUTIONAL AND INTELLECTUAL LIFE* (1959) (slavery had cruelly destroyed the culture of black Africans, thus reducing them to infancy, which required them to survive in childhood situations).

216. See DUNAWAY, *supra* note 111, at 56-57 (“Slaveholders carefully planned marriage breakups. . . . Still, the white mistress never forewarned the slave [of the sale]. A week later, ‘Poot L. [w]as gone. When she saw there was no hope, she submitted humbly and quietly.’”); GUTMAN, *supra* note 61, at 9 (“No slave family was protected in the law.”).

217. FRANKLIN, *supra* note 24, at 6 (stating that the master could interfere with the father and mother’s right to discipline their children by whipping the slave children).

218. *Id.* (“[The slave father could] be sold away without being able to protest or lift a preventing finger.”).

219. SCHWARTZ, *supra* note 6, at 24 (“Husbands allays went to de woods when dey know de wives was due fo’ a whippin’.”) (internal quotation marks omitted).

220. FRANKLIN, *supra* note 24, at 6 (“[A slave] wife could be made the master’s concubine, [and the slave’s] daughter could be outraged.”).

221. See SCHWARTZ, *supra* note 6, at 190-91 (discussing how the master assigned slave mates, and if a slave union did not produce children, the master would forcibly part the couple).

gave rise to the master's preference for the "Negro Matriarchy."<sup>222</sup> In the end, most scholars, especially those who built on E. Franklin Frazier's influential work, *The Negro Family in the United States*,<sup>223</sup> would conclude that slavery destroyed the stability of the black family by supplanting the male role with female authority,<sup>224</sup> and by leaving black cultural norms so weak that when blacks transmitted them to their children, they passed along a "culture of poverty."<sup>225</sup>

In 1899, W.E.B. Du Bois, in examining the black family in Philadelphia,<sup>226</sup> had reached a similar judgment. He concluded that while most blacks in Philadelphia were doing well, especially given the short time since the end of slavery, nearly one-fourth of that city's 40,000 blacks were living as the "submerged tenth," and, therefore, languishing in poverty, and suffering high rents and low wages.<sup>227</sup> Although Du Bois attributed structural problems suffered by these blacks to white racism, he focused on "social and familial effects."<sup>228</sup> For him, lower incomes hindered marriage, which led to unstable unions, and which contributed to black sexual immorality. And without sufficient income, mothers had to work, thus leaving their children many days per week with neither guidance nor restraint, which destroyed manners and morality.<sup>229</sup> In the end, the black "home was destroyed by slavery, struggled up after emancipation, and is again not exactly threatened, but neglected in the life of city Negroes."<sup>230</sup>

By implication, external, objective, structural forces determined how the black family fared. For Du Bois, sexual morality would be his lens for understanding black family instability. And so he argued that slavery continued to shape sexual mores of blacks, thus leading to illegitimate children, all of whom would grow up in unstable families.<sup>231</sup> And so, he concluded: "Sexual immorality is probably the greatest sin-

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222. PATTERSON, *supra* note 18, at 35; see DUNAWAY, *supra* note 111, at 78-79 ("In the day-to-day existence of children in disrupted households, mothers were the center of families, while masters kept fathers somewhere else. Even those who 'would git to come home every Saturday night' were sometimes seen by their own children as temporary intruders whom they hardly knew.").

223. See generally FRAZIER, *supra* note 3 (discussing the History of African American families).

224. PATTERSON, *supra* note 18, at 35.

225. *Id.* at 37.

226. See generally W.E.B. DU BOIS, *supra* note 208.

227. PATTERSON, *supra* note 18, at 27.

228. *Id.*

229. See W.E.B. DU BOIS, *supra* note 208, at 193-96.

230. *Id.* at 196.

231. See THE NEGRO AMERICAN FAMILY 41 (W.E.B. Du Bois ed., 1908).

gle plague spot among Negro Americans, and its greatest cause is slavery and the present utter disregard of a black woman's virtue and self-respect, both in law court and custom in the South."<sup>232</sup> Other scholars looked at the impact of slavery and sharecropping on the black family. In 1937, John Dollard wrote that lower-class black men were seething with "anger and self-loathing."<sup>233</sup> Moreover, in 1939, two sociologists reached fairly similar conclusions on the stability on the black family. In *After Freedom*, Hortense Powdermaker argued that black families have been typically ruled by women who rely on extended kinship networks, which differ from rigid, white patriarchal family structures.<sup>234</sup> Similarly, E.W. Burgess declared that the instability of the black family stemmed from its chief handicap, which was "an unorganized and disorganized family life."<sup>235</sup> In 1944, Gunnar Myrdal, the Swedish economist, agreed, writing that slavery greatly destabilized the black family.<sup>236</sup>

Yet, Myrdal's work on race and American democracy would be greatly influenced by E. Franklin Frazier's seminal work, *The Negro Family in the United States*.<sup>237</sup> In that work, Frazier argued that slavery's brutality indeed had destroyed West African cultural roots in blacks, had emasculated black men, and created the "matriarchate"—female-headed families. While Frazier acknowledged that some black families were headed by strong black men, who acquired property, garnered educations, played the breadwinner role, and served as "role models for their children," he generally believed that slavery's brutality had nearly completely stripped blacks of the "social heritage" that earlier Africans had brought to America.<sup>238</sup> Without cultural or moral bearings, black families were arguably steered by "naïve and ignorant folk," who could not stem out-of-wedlock babies that were rampant in the black community. As they migrated to urban settings, black families became unstable as their folkways and mores began to dissolve.<sup>239</sup>

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232. *Id.*

233. *See* Patterson, *supra* note 23, at 21-22 (citing and discussing John Dollard's arguments).

234. PATTERSON, *supra* note 18, at 28.

235. *Id.*

236. *Id.* at 28-29. *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944) (discussing the American Negroes' position and autonomy in America).

237. PATTERSON, *supra* note 18, at 30-31.

238. *Id.* at 30. *See generally* KARDINER & OVESEY, *supra* note 15, at 38-41 (making the same argument that American slavery had stripped blacks of literally any viable vestige of West African culture and heritage, leaving them without the wherewithal to overcome their cultural challenges).

239. PATTERSON, *supra* note 18, at 30-31.

In short, in the 1940s, black family instability owed its existence not only to slavery's brutality and cultural destruction, but also to a breakdown of the *old ways* on which migrating blacks had used to hold themselves and families together.<sup>240</sup>

In analyzing this instability, Myrdal agreed with Frazier: slavery's brutality and white racism, two powerful and external structural forces, had substantially constructed "black culture as 'a distorted development, or a pathological condition, of the general American culture.'"<sup>241</sup> In 1963, Nathan Glazer and Daniel Patrick Moynihan would agree with Frazier, Myrdal, and others' central principle that slavery caused pathologies within the black family.<sup>242</sup> Accordingly, they argued that although the majority of black families were intact, slavery's lingering impact had caused not only weak families but also black males suffering from "psychological difficulties."<sup>243</sup> Among other things, black parents would "refuse to accept responsibility for and resent their children, as Negro parents, overwhelmed by difficulties, so often do."<sup>244</sup> As such, black fathers left their children, especially males, without positive models, even though black girls who came out of this same milieu did better in school, had better attention spans, and "had more positive and realistic self-concepts."<sup>245</sup> Unlike ethnic groups, they argued: "the Negro is only an American, and nothing else. He has no values and culture to guard and protect."<sup>246</sup> Without such values and culture, especially their West African roots, slavery's lingering brutality and white racism could reduce blacks and

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240. *Id.*

241. *Id.* at 32.

242. NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT: THE NEGROES, PUERTO RICANS, JEWS, ITALIANS, AND IRISH OF NEW YORK CITY* 52 (1963) ("The experience of slavery left as its most serious heritage a steady weakness in the Negro family. There was no marriage in the slave family—husbands could be sold away from wives, children from parents. There is no possibility of taking responsibility for one's children, for one had in the end no power over them. One could not educate them, nor even, in many cases, discipline them. . . . What slavery began, prejudice and discrimination, affecting jobs, housing, self-respect, have continued to keep alive among many, many colored Americans.").

243. *Id.* at 51.

244. *Id.* at 50.

[Willie James's mother] Laura Bosket, had filed a petition with the Family Court to have Willie declared a 'person in need of supervision,' what the judges, lawyers, and social workers around the court called, with Kafkaesque simplicity, a PINS. . . . [The Act] defined a person in need of supervision as a child under sixteen 'who is an habitual truant or who is incorrigible, ungovernable or habitually disobedient and beyond the lawful control of parent or other lawful authority.' Of course, it might be the parents who were really to blame, but the court couldn't punish the parents.

See BUTTERFIELD, *supra* note 17, at 151.

245. GLAZER & MOYNIHAN, *supra* note 242, at 51.

246. *Id.* at 53.

their families to things and habitus that kept such things subject to the master's authority. Having been reduced to their natural being, blacks would internalize these psychologically and existentially destructive core beliefs, and after emancipation, they would, as in the intergenerational run-up to Willie James Bosket, rely on such beliefs to adapt their families to neo-slavery's brutality and white racism.<sup>247</sup>

Yet, as Du Bois, Frazier, Myrdal, Glazer, and Moynihan noted, most blacks existed in stable, intact families.<sup>248</sup> Accordingly, despite slavery's brutality and white racist principles, some black families were stable, and despite this fact, sociologists still credited external, objective, and structural forces with destroying the black family.<sup>249</sup> In this way, these sociologists ignored what worked within middle-class black families by simply attributing their success to traditional roles and to available resources, and they equally ignored the deeper, behavioral and emotional causes for why lower-class families were unstable by attributing their disorganization to larger, external forces like slavery and Jim Crow.<sup>250</sup> Unfortunately, by so doing, these sociologists refused to account for the cultural practice of obedience training's and rigid physical violence's impact on the children's personality development and compensatory behavior, some of which would result in psychological difficulties and pathologies, all of which could, and perhaps did, cause instability within the black family.<sup>251</sup>

By arguing that a tangle of pathologies explained the instability of the black family, Moynihan and Kenneth B. Clark, like sociologists before them, thus could condemn slavery's brutality and white racism for the inferiorities and pathologies of blacks, especially black males, which were exemplified through illegitimate children. As such, slavery's strictures destroy stable black families by encouraging black men

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247. See PATTERSON, *supra* note 18, at 33 (“[Slavery’s savagery turned on the] ‘absolute power’ of those that created the system. This had destroyed “African cultural traditions” and prevailed in creating a ‘cruelly logical reduction” of the African to nothing more than a piece property.’”).

248. See, e.g., FRAZIER, *supra* note 3, at 82 (“The colored people . . . generally held their marriage (if such unauthorized union may be called marriage) sacred, even while they were yet slaves. Many instances will be recalled by the older people of the South of the life-long fidelity and affection which existed between the slave and his concubine—the mother of his children.”).

249. See *id.* at 102-13 (discussing the rise of the black matriarch during slavery and her continued dominance after emancipation as a powerful force that undermine the stable role of the black male and the organization of the black family).

250. See DUNAWAY, *supra* note 111, at 257-67 (discussing the black family’s disorganization and reconstruction during the immediate years following the end of slavery).

251. See CLARK, *supra* note 23, at 81 (“The dark ghetto is institutionalized pathology; it is chronic, self-perpetuating pathology.”).

to sire babies but bear no financial responsibility to them<sup>252</sup> and no moral obligation to their lovers. Having never experienced a European style family with rigid roles, slavery's emotional brutality rippled forward into Reconstruction, Jim Crow, and modern black family. Thus, Charles Silberman could argue:

With no history of stable families, no knowledge even of what stability might mean, huge numbers of Negro men took to the roads as soon as freedom was proclaimed . . . . Thus there developed a pattern of drifting from place to place and job to job and woman to woman that has persisted (in lesser degree, of course) to the present day.<sup>253</sup>

Basically, by destabilizing the black family, slavery as an institution needed black males to accept mentally, or at least to internalize emotionally, what white masters generally required of them. So they denied black males power. They broke them psychologically. They questioned them existentially.<sup>254</sup> To compound the problem, white masters installed black women as matriarchs, for they were both concubines and capital accumulators. And as the story goes, black males—now dependent, inferior, and pathologized—were perforce left with sexual prowess if it served the masters' need for more babies and if it did not stray beyond the slave quarters.<sup>255</sup> In this way, Whitney Young could posit that slavery sanctioned "promiscuous breeding."<sup>256</sup>

In analyzing the causes of black family instability, Silberman agreed with Young, arguing:

[T]he oppression and discrimination—structural forces— . . . had caused "disorganization of the family," which in turn had long-term cultural consequences. "The difficulty Negro men experience in finding decent jobs . . . is central to the perpetuation of matriarchy and the weakness of family relationships." The root cause of this

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252. Cf. MAGID & MCKELVEY, *supra* note 34, at 272 ("[It would be better] to educate young potential fathers, who have long escaped their fair share of responsibility for preventing pregnancy. . . . Robert Mnookin . . . recommends that child-support laws be strictly enforced to make clear to young men that one mistake can mean 18 years of child-care bills.").

253. PATTERSON, *supra* note 18, at 41 (quoting CHARLES SILBERMAN, *CRISIS IN BLACK AND WHITE* 235 (1964)).

254. See DUNAWAY, *supra* note 111, at 79 ("When the master terminated his regular weekly trips, Threat's father ran away and hid near his family. 'He'd slip in to [the family] at night and hide out in the daytime.' Jim's 'father stayed out for a few days . . . then he came back and give himself up and took his whipping.' According to Threat, the master tried to demean the punished male before his family. 'When they whupped a slave they made him say 'Oh, pray master' to show that he had to be humble.'").

255. See SCHWARTZ, *supra* note 6, at 188-90.

256. PATTERSON, *supra* note 18, at 40.

situation was slavery, which “had emasculated the Negro males, had made them shiftless and irresponsible and promiscuous,” and by negating their role as husband and father, forced them to become “totally dependent on the will of another.”<sup>257</sup>

Put bluntly, powerful external, objective, and structural forces like slavery, Jim Crow, and modern discrimination determined the moment-to-moment existence of black life, as Kimberly Crenshaw has argued,<sup>258</sup> thus perhaps permanently causing instability in the black family. These forces were simply ubiquitously present within the black family like a mind-altering gas, which traumatize adults and children alike, which caused violent childrearing practices,<sup>259</sup> and which perforce undermined real bonding, intimacy, and attachment between parent and child.<sup>260</sup> Oppressed by white racism, abused by well-intentioned parents, and denied a healthy attachment to their caregivers,<sup>261</sup> black children, especially boys, can adopt aggressive, anti-social behavior, become delinquent, and act criminally.<sup>262</sup> As such, a complexity of external, objective, and structural forces like *white* racism not only destabilized black families and *caused* black parents to violently maltreat their children, but also posed black folks like mannequins and scripted them with ideological notions that reinforced self-annihilating conduct like a pathological culture of sexual bravado, irresponsibility, and aggression.<sup>263</sup>

As in *All God's Children*, in which Butterfield acknowledges interpersonal issues while he clearly faults structural forces, Kenneth

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257. *Id.* at 41.

258. Crenshaw, *supra* note 167, at 1357 (“Black people do not create their oppressive worlds moment to moment but rather are coerced into living in worlds created and maintained by others. Moreover, the ideological source of this coercion is not liberal legal consciousness, but racism.”).

259. See Kenneth A. Dodge et al., *The Cultural Context of Physically Disciplining Children*, in *AFRICAN AMERICAN FAMILY LIFE: ECOLOGICAL AND CULTURAL DIVERSITY* 245, 248 (Vonnie C. McLoyd, Nancy E. Hill & Kenneth A. Dodge eds., 2005) (“Ogbu has suggested that the context of slavery within which African Americans entered this country set the stage for physical means of control of other persons as a historical legacy.”).

260. *Id.* at 251 (“[One of the long-term effective of even mild physical punishment, which was only defined negatively as not criminally abusive is that] the parent and child fail to develop a trusting, intimate relationship that is necessary for the child’s development of internalized standards for behavior and that the child learns a style of losing control in conflict situations”).

261. Cf. Inge Bretherton, *The Origins of Attachment Theory: John Bowlby and Mary Ainsworth*, 28 *DEVELOPMENTAL PSYCHOL.* 759 (1992) (discussing a child’s bond with the mother and the effects it has on child development patterns).

262. Dodge et al., *supra* note 259, at 251 (“A broad body of research has documented the positive correlations between parents’ use of physical punishment and subsequent child anti-social outcomes, including aggressive behavior, delinquency, and criminality.”) (citations omitted).

263. See CLARK, *supra* note 23, at 70-74.



Clark argued that the black ghetto suffers from a pathology, which is self-perpetuating. He argued: “[T]he pathologies of the ghetto commonly perpetuate themselves through cumulation, ugliness, deterioration, and isolation and strengthen the Negro’s sense of worthlessness giving testimony to his impotence.”<sup>264</sup> To compensate for this inferiority, which has been sown into their consciousness by the “dominant gaze”<sup>265</sup> and legalized “microaggressions”<sup>266</sup> of external, objective forces, blacks came to believe in their own inferiority, and they engaged in compensatory conduct like over-sex and hyper-masculinity, which gets immediately supplanted by the “down-low” phenomenon.<sup>267</sup>

And while some sociologists like Lee Rainwater argued that “culture can by and large not be changed directly, or at least is inordinately difficult to change,”<sup>268</sup> others asserted a contrary view. They argued that if society altered the situations in which a pathological culture thrived, people would gradually change their own culture.<sup>269</sup> Unfortunately, the cultural norming, which is obedience training and rigid physical violence, and which can cause not only antisocial personality disorder but also stability of the black family, is largely shared by nearly all blacks regardless of their socio-economic status.<sup>270</sup> Furthermore, when sociologists focus on situations, they presuppose that structural forces and not black parents’ commitment to obedience

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264. PATTERSON, *supra* note 18, at 35.

265. See generally Margaret Russell, *Race and the Dominant Gaze: Narratives of Law and Inequality in Popular Film*, 15 LEGAL STUD. F. 242 (1991) (discussing mainstream culture’s disposition to recreate racial disparities and stereotypes through subtle narration and images).

266. See generally Peggy C. Davis, *Law As Microaggression*, 98 YALE L.J. 1559, 1565 (1989) (“[Microaggressions] are subtle, stunning, often automatic, and non-verbal exchanges which are ‘put downs’ of blacks by offenders.”).

267. See generally KEITH BOYKIN, *BEYOND THE DOWN LOW: SEX, LIES, AND DENIAL IN BLACK AMERICA* (2005) (discussing the social stigmas that are associated with the down low lifestyle which perpetuate the idea of black pathology); J.L. KING WITH KAREN HUNTER, *ON THE DOWN LOW: A JOURNEY INTO THE LIVES OF STRAIGHT BLACK MEN WHO SLEEP WITH MEN* (2001) (explaining the deceit, shame, and guilt that accompanies a black man’s life on the down low).

268. PATTERSON, *supra* note 18, at 38.

269. *Id.*

270. See RICHARD J. GELLES, *INTIMATE VIOLENCE IN FAMILIES 6-7* (1997) (arguing that it is a myth that family violence like child abuse is limited to the lower classes, concluding that the lower classes are overrepresented for engaging in child maltreatment); Hampton & Gelles, *supra* note 30, at 29.

We examined the relationship among education, income, and occupation and violence toward black children. Neither educational attainment nor occupation yielded a discernible pattern. Black respondents who reported annual incomes below the poverty line reported higher rates of overall violence and very severe violence, although the differences were not statistically significant.

*Id.*

training and rigid physical violence explain why blacks like Willie James fail to thrive. By so doing, these sociologists, including authors like Butterfield, remain emotionally blind scholars who would rather directly and indirectly fault white racism than directly fault the parents who more than likely were reared under the stultifying aegis of obedience training and rigid physical violence.

### III. “I’M NO AVERAGE CAT”:<sup>271</sup> SELF-ANNIHILATING BAD NIGGERS, EXPURGATING EMASCULATING BLACK MOTHERS, AND PROJECTING POISONOUS PEDAGOGY

*It is now de rigueur to deny that the antimaternal verbal content of the dozens of other black tropes [like mother-fucker] bears any relation to problems in the actual mother-son relationship. I find this politically correct denial simply preposterous.*<sup>272</sup>

Given the insidiousness of cruelty as love,<sup>273</sup> one of the badges and incidents of child maltreatment, Willie James loved and hated his mother. Laura thought herself a good mother.<sup>274</sup> Since the day Willie James had entered the world, she did whatever it took to love him by keeping food in his gut, clothing on his back, and shelter over his head.<sup>275</sup> In response, Willie James, perhaps serving in his father’s stead, assumed the role of protector. After Laura’s boyfriend, Jose, caused her to suffer a severe burn, Willie James went crazy, picking “up an iron pipe and hit[ting] Jose, then slash[ing] him with a knife.”<sup>276</sup>

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271. BUTTERFIELD, *supra* note 17, at 174.

272. Patterson, *supra* note 23, at 15.

273. See GELLES, *supra* note 270, at 12 (“That violence and love can coexist in a household is perhaps the most insidious aspect of family violence, because we grow up learning that it is acceptance to hit the people we love.”); MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 5 (“The conviction that parents are always right and that every act of cruelty, whether conscious or unconscious, is an expression of their love is so deeply rooted in human beings because it is based on the process of internalization that takes place during the first months of life—in other words, during the period preceding separation from the primary care giver.”).

274. BUTTERFIELD, *supra* note 17, at 143.

275. See HOOKS, *supra* note 125, at 26-27.

A grown-up woman trying to understand ‘this thing called love,’ I was taking a critical look at my relationship with my father. I told Mama I did not feel Daddy loved me. And she told me, ‘Of course he loves you. He’s taken care of all your needs all these years.’ Tears overwhelmed my words as I tried to explain to her that love was more than meetings someone’s material needs – that it was about respect, care, knowledge, and responsibility . . . I knew there was more to loving than caring for material needs.

*Id.*

276. BUTTERFIELD, *supra* note 17, at 143.

Yet, Willie James hated Laura, too. She violently beat him, and she deceived and manipulated him too,<sup>277</sup> and so he also deeply distrusted her.<sup>278</sup> Having a hard time controlling him, Laura sometimes “slapped him around with her hand until the veins popped out, or she would give him a whipping with a belt.”<sup>279</sup> When that became too much, she dumped him into the juvenile justice system, as if she were simply washing her hands of him.<sup>280</sup> But every time Willie James escaped from one facility after another, he always went home or he cursed out judges, declaring that he just wanted to go home. “Home” was therefore a trope, giving Willie James hope that he would get more of the love and tenderness he needed, and reminding him that he would revisit the site at which Laura’s emasculating projections were beaten into him.<sup>281</sup>

However, since he was six-years-old, Willie James insulted, fought, beat, raped, threatened to kill, and killed others because his body was bloated with rage and resentment, which emanated from his childhood maltreatment by his mother, Laura.<sup>282</sup> In effect, given the degree to which black families embraced obedience training and rigid physical violence,<sup>283</sup> black parents like Laura have the power to strongly influence the progress of blacks as a community if they do not destroy their children’s broadest emotional, behavioral, and intellectual ranges through spanking, beating, traumatizing, and failing to attach to them.<sup>284</sup> Unfortunately, the foregoing childrearing styles, which inhere in most black families, might reflect the lag in black community’s evolutionary history, even though some scholars argue that

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277. *See, e.g., id.* at 140.

278. *Id.* at 142 (noting that upon finding out that his father was not in the army but in prison, Willie James became angry because Laura, his mother, had deceived him).

279. *Id.* at 143.

280. *Id.* at 149 (“After a few more episodes, Laura finally gave in to pressure from the Bureau of Child Welfare. She agreed to take Willie to Family Court and seek a petition that would have him committed to an institution. The agency told her it would try to get him sent to Wiltwyck, which hit Laura kind of hard. She remembered how Butch used to tell her that he had been sent to Wiltwyck at nine, the same age Willie was now.”)

281. *See generally* Patterson, *supra* note 23, at 16-18 (describing how difficult it is for lower-class males to separate from mothers even if the mother is neglectful or abusive).

282. *See generally* MILLER, *THE BODY NEVER LIES*, *supra* note 119, at 33 (describing how adults mistreated as children have no general understanding of ethical concerns or morality; rather, they only know what their bodies have actual experiences, especially childhood trauma).

283. *See, e.g.,* STRAUS WITH DONNELLY, *supra* note 5, at 117 (“Some [African Americans] also argue that corporal punishment is part of black culture.”).

284. *See* BUTTERFIELD, *supra* note 17, at 135 (noting that Laura had restricted her emotional availability just as Willie was about to be born).

blacks rely on a range of family structures.<sup>285</sup> Regardless, they share this cultural norm, which permits black caregivers under the doctrine of parental privilege to destroy perhaps the broadest, deepest developmental ranges. For example, despite Butch's and Willie James' intelligence, they had a limited emotional range, principally because, due to their childhood history of traumatic brutality and poor, if not anemic, bonding to their parents, they suffered scarring to the brain,<sup>286</sup> which to Butterfield and others presented as an impulsive-gene.<sup>287</sup> As a result, notwithstanding slavery's legacy, Jim Crow, modern discrimination, urban decay, and poor job opportunity, it is the black family that effectively undermines its children's readiness to leap into a different evolutionary thinking about childhood parenting styles.

As such, when childhood parenting styles fail to evolve, it is as if black parents are trapped in a historical period like slavery and Jim Crow, which no longer exists except in their collective, traumatic memories. Such memories might warrant blacks to celebrate West African cultural norms, which perforce mandates that they teach children their "proper places," all of which begins with obedience to parents and ends with homage to elders and with fear of God.<sup>288</sup> If

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285. See DEMAUSE, *supra* note 123, at 60-61. As Lloyd deMause argues that "since some people still kill, beat, and sexually abuse children, any attempt to periodize modes of child rearing must first admit that psychogenic evolution proceeds at different rates in different family lines, and that many parents appear to be 'stuck' in earlier historical modes." *Id.* For example, black families today still rely on beating and molding their children through a number of socialization vehicles like religion for the 14th century, and they also consider violent physical discipline critical as dispensable to raising a black child to a good, productive citizen. Yet, this childrearing model aligns itself more with DeMause's *Ambivalent Mode*, in which at the very least parents use violence to mold their children. *Id.* at 61.

286. See, e.g., MILLER, *FOR YOUR OWN GOOD*, *supra* note 27, at ix-x ("[C]hildren are beaten, and at the very time when it is most damaging to them. During the first three years of life, the child's brain grows very fast. The lessons of violence learned at this time are not easy to dissolve. Children must deny the pain in order to survive, but this strategy leads them, as grown-ups, to the emotional blindness responsible for the absurd attitude they act upon as parents and educators. The denial of violence endured leads to violence directed toward others or oneself.").

287. See, e.g., *id.* at ix. On this point, Miller argues based on Oliver Maurel's work that:

The body stores up in its cells what it has endured from the moment of conception . . . .  
The memory of the body underlies the mystery of the compulsion to repeat, especially the compulsion of so many adults to repeat with their own children what they endured very early in life but do not recall.

*Id.* Given the personal and collective trauma of the slave's childhood, it must follow that when they emerged from the plantation as free liberal subjects, they not only still possessed the mind of a slave and the bodily experiences of brutal maltreatment, but also imposed that mind and experience on their own children, especially if they were equally maltreated by their own parents and caregivers on the plantation.

288. See Shelton, *supra* note 25, at 239 ("The individual is dependent also upon God and the gods: he must do certain things and avoid other actions if he wishes to avoid suffering the wrath

obedience training and rigid violent discipline draw on these memories, then I can draw the strong inference that more than likely the instability within the black family finds its causation in the impact of violent obedience training on black children. If so, then the legacies of slavery and Jim Crow become socio-historical phantoms, on which black parents, especially pundits and the black clergy, rely to shelter their dark secrets from intense public scrutiny.<sup>289</sup>

Consider Glenn Davis' argument, which draws heavily on Lloyd de Mause's psychogenic framework:

Since individuals are formed in their early years, he said, and individuals, not "broad forces," form history, all history is first determined in the infancy and childhood of individuals. Moreover, the evolution of history is caused by the lawful evolution of childhood itself. All progress has its origins in advances in parenting. What I anticipated would be a . . . totally new theory of historical motivation, one which held traditional history to be pure narration and sociological theory to be pure tautology.<sup>290</sup>

All things considered, it is entirely possible that Willie James engaged in self-annihilating behavior because he needed to do at least two things. First, he needed to reject Laura's need to stunt her child's broadest development, which she unconsciously pursued by not emotionally investing and bonding with Willie James. Keep in mind that when she learned from the Bellevue psychiatrist that Willie James might be suicidal, Laura could not empathize, suggesting that her mother did not model empathy for her. Laura could not appropriately express her suffering over her father's absence because her mother would suffer too, and so she lied to her, thus in effect forbidding her from even perhaps crying or mourning her supposedly dead father. Hence, what Laura's mother killed in her, or at the very least did not give her, she would kill, or could not give, to Willie James.<sup>291</sup>

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of the High God, the deified Earth, or any of the numerous deities of the localized Igbo pantheon.").

289. Cf. JANET HEIMLICH, *BREAKING THEIR WILL: SHEDDING LIGHT ON RELIGIOUS CHILD MALTREATMENT* 85 (2011) ("Such strictness is influenced by cultural factors, but authoritarian parenting also has theological roots. For example, the Bible is clear on the importance of child obedience. 'Honor your father and your mother, that your days may be long upon the land which the LORD your God is giving you,' so reads Exodus 20:12 and Deuteronomy 5:16, arguably the most repeated of the Ten Commandments. Ephesians 6:1 reads, 'Children, obey your parents in the Lord, for this is right.' And Colossians 3:20 goes so far to say, 'Children obey your parents in all things, for this is well pleasing to the Lord.'").

290. DAVIS, *supra* note 196, at 7.

291. See MILLER, *FOR YOUR OWN GOOD*, *supra* note 27, at 62 (repressing a child's suffering "leads to a lack of empathy").

That left him with an emptiness, which he filled not only with aggression but also with a need to be home, causing Willie James to escape from every facility in which the juvenile courts had placed him.

Second, Willie James needed to expurgate his mother's emasculating violence. Since Laura was a child, she missed having a father.<sup>292</sup> Her mother more than likely coped with the possible destabilizing effect of Laura's father's absence by doing at least two things. First, she told Laura that her father had not abandoned them but had died in a car accident.<sup>293</sup> That was a lie. Second, and here I speculate, Laura's mother needed to work through her great disappointment and perhaps distrust of Laura's father and, perhaps, all men.<sup>294</sup> To do so, she taught Laura that men use women for sex and making babies and then leave them. In effect, Laura's mother was confessing that she felt used, sullied, and abandoned.<sup>295</sup> Unfortunately, she projected her psychic damage to Laura, who identified with the mother, and internalized her implicit hatred of, love for, and need of men.<sup>296</sup> Later, despite her dreams, Laura took up with Butch, who she eventually learned was a criminal.<sup>297</sup> Nevertheless, he always had money, was smart, and treated her well. Perhaps seeking to expurgate her mother's psychic damage, Laura would marry Butch (and perhaps symbolically her father), thus unconsciously hoping to stave off the fate that befell her mother.<sup>298</sup> Unfortunately, she twice suffered her mother's fate,<sup>299</sup> at which time Laura, perhaps unconsciously, took up her mother's cause célèbre. As her mother did to her, she would do to Willie James. To ratify her mother's teachings, and to rationalize how her mother treated her, Laura unconsciously needed to adjust her son's potential need to seduce, impregnate, and abandon women.<sup>300</sup>

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292. See BUTTERFIELD, *supra* note 17, at 134.

293. *Id.*

294. *Id.*

295. *Id.*

296. *See id.*

297. *Id.* at 135.

298. Cf. LEONARD SHENGOLD, SOUL MURDER: THE EFFECTS OF CHILDHOOD ABUSE AND DEPRIVATION 29 (1989) ("Identification with the aggressor enables the former victim to follow the compulsion to repeat, playing the active, sadistic, parental role. This too can be motivated in part by the delusive wish to make the bad parent good: 'I'll be father [or in Laura's case, mother] and do it, and *this time* it will be good.'").

299. BUTTERFIELD, *supra* note 17, at 134 ("'There was a man,' is the way Laura remembered it later. 'I got what you would call expecting a baby.' But the father didn't stick around, and Laura had to drop out of school. . . . She registered to vote when she turned twenty-one, but only to get the identification card so she could buy liquor.").

300. See MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 16 ("For parents' motives are the same today as they were then: in beating their children, they are struggling to regain the power

And yet, Laura harbored rage and resentment within her, too.<sup>301</sup> In the end, she poisoned Willie James with obedience training and rigid physical violence to kill the “man” within him, and she’d objectify him by unconsciously making him a violent tool for her rage and resentment.<sup>302</sup>

Yet, Willie James knew that he warred within himself. After all, he loved and hated his mother. Citing others, Orlando Patterson proffers a compelling argument,<sup>303</sup> one that parallels my Article’s argument that it is the natural consequences of obedience training and rigid physical violence that perpetuate the instability of the black family, especially if we adopt a definition of instability that embraces both the absence of one or more parents and the dysfunctional practices of the family that weaken its ability to advance the child’s best interest and welfare needs. In short, Patterson argues that single black women, especially those who neglect or abuse their male children, cause their male children to identify with them too closely, which Miller called splitting and projecting.<sup>304</sup> That is, the male child splits off his bad feelings like rage and resentment from his experiences with neglect and abuse, thus repressing them. The neglected and abused black child then acquires a distorted perception of reality, thus believing that the entire world will harm and hurt him.<sup>305</sup>

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they once lost to their own parents. For the first time, they see the vulnerability of their own earliest years, which they are unable to recall, reflected in their children.”). In *Blacklash*, Patterson impliedly argues that the rise of antimaternal aggression by black men may be the result of the emasculating parenting styles of black mothers who wish to destroy in their children, especially males, the power not that was necessarily exercised over them by their children’s daddy but by their fathers or male caregivers when these mothers were children. Patterson, *supra* note 23, at 16-18; see MILLER, FOR YOUR OWN GOOD, *supra* note 27, at 60 (“[I]t is the parents who not only project their sexual and aggressive fantasies onto the child but also are able to act out these fantasies because they wield the power.”).

301. See BUTTERFIELD, *supra* note 17, at 135 (“‘My dreams don’t count no more,’ Laura explained. She also became forgetful about the past, her family noticed. They figured it was her way of protecting herself. Her emotions were constricting just as she was about to give birth to Butch’s child, when her baby would need all the love she had.”).

302. See *id.* at 190 (“Cruise thought [Laura] alternated between rejecting [Willie James] and intense feelings of guilt and frustration over his bad behavior. . . . [After Cruise asked Laura how she felt about Butch going to prison and abandoning her while she was pregnant with Willie James, indignity filled her voice.] It was as close as he had seen Laura come to expressing an emotion. That anger spilled over into her feelings for Willie, Cruise thought.”).

303. See Patterson, *supra* note 23, at 15-18 (discussing the work of Sigmund Freud, Peter Blos, Scanzoni, Dale Meers, and Nyhlengule in his analysis of the mother-son relationship).

304. See JANOV, WHY WE GET SICK, *supra* note 69, at 22. This article explains that while the maltreated child consciously shifts away from her authentic feelings and being so that she can please the parent, she acts increasingly “unreal, that is, not in accord with the reality of [her] own needs and desires. In a short time the neurotic behavior becomes automatic.” *Id.*

305. See Patterson, *supra* note 23, at 16-18.

Relying on Dale Meers' analysis of Virgil's case, Patterson argues that when black fathers minimally participate in the child's socialization, a child like Willie James cannot physically, existentially, and psychologically escape his mother's emotional and psychic projections.<sup>306</sup> And when boys fail to separate from the mother and her maltreatment, there are psychological consequences, one of which is aggressive, self-annihilating conduct. Moreover, these boys need to engage in compensatory acts like hyper-masculinity, so that they can expurgate "painful, emerging fantasies and dreams of being a girl."<sup>307</sup> Consider *The Boondocks*, in which Riley fears going out like "bitches."<sup>308</sup> Besides the "cool pose," black boys like Willie James then would engage in "antimaternal abuse and promiscuous sexual and physical violence of the street culture."<sup>309</sup> These acts become a "belated, but savagely effective means of breaking with mother."<sup>310</sup> By breaking with mothers like Laura, Patterson would argue that black boys like Willie James attempt to expurgate the emasculating female figure who loves them and "debases the man he will become, who nurtures and brutally disciplines."<sup>311</sup>

To make the point emphatically, Patterson writes:

The result is the "b-boy" (baad boy) masculinity that brooks no "dissing . . . links gender identity with predatory violence" against women, and achieves respect through murder and suicide. The murder of fellow black youths, it should be further noted, is a pathologically gratifying way of gaining the approval of the internalized mother's debasement of "rotten, no-good, 'mother-fucking' men." And suicide is the ultimate high, especially when it is masked in the "macho" way. For in one fell swoop, it gains the respect of peers, since the victim appears to have gone down gunning; it satisfies the internal impulse to be punished, as the inner mother dictates; it compels the attention and love of the outer mother who recognizes, at last, what she has lost, even as it punishes her by the grief it is bound to cause; and, not least of all, it expresses the self-loathing, meaninglessness, frustration, worthlessness, and utter ni-

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306. *Id.* at 16.

307. *Id.*

308. See *The Boondocks: The Red Ball* (Cartoon Network television broadcast May 16, 2010).

309. Patterson, *supra* note 23, at 16.

310. *Id.* at 16-17.

311. *Id.* at 17.



hilism of growing up desperately poor, black, brutalized, and neglected in the late twentieth-century America.<sup>312</sup>

Undoubtedly, Patterson's insights apply to Willie James, even though he fails to address why black mothers require strict obedience especially from their male children.<sup>313</sup> He defended his physical and emotional boundaries swiftly, suffering no one to harm him or offend him.<sup>314</sup> Butterfield attributed this behavior to impulsiveness, which is a trait of psychopathic behavior, and which suggests at the very least that Laura's abusive neglect and violence had already damaged Willie James existentially.<sup>315</sup> Moreover, when he rolled with his posse, Willie James opportunistically preyed on women and men.<sup>316</sup> Yet, Laura made Willie James feel weak and powerless. He needed to get that out of him. For example, he killed a cat by smashing a bottle over its head after he had a fight with his mother, Laura.<sup>317</sup> And inevitably,

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312. *Id.* at 18.

313. *See, e.g.*, BUTTERFIELD, *supra* note 17, at 210. Consider the following:

When Laura saw Willie [at the police station where he sat handcuffed], he remembered later, her eyes narrowed and her voice grew cold. "Get your ass over here, right now," she commanded between clenched teeth. Willie kept his eyes on the floor, his lips out and his face pouting. "Didn't I say get your ass over here," Laura barked. "And straighten out that face. You always getting in trouble. . . . On the short walk home, if Willie didn't move fast enough, Laura gave him a shove. After they got back to the apartment, Willie thought she might give him a good whipping with a belt, as she had when he was younger. But by now, he calculated, she had learned that it didn't make much difference. She just ordered him, "Go to bed before I knock the shit out of you."

*Id.* Unfortunately, Willie James simply took Laura's verbal abuse, threat, humiliation, and physical battery. He said nothing. Perhaps he had already learned over the arc of his young years that Laura wanted him to repress his emotions just as she had done when she faced her deepest lost and invasive humiliations. Willie James thus had to be silent; he had perhaps to take it, too. *See also* MILLER, *FOR YOUR OWN GOOD*, *supra* note 27, at 7 ("[If] parents cannot tolerate his reactions (crying, sadness, rage) and forbid them by means of looks or other pedagogical methods, then the child will learn to be silent. This silence is a sign of the effectiveness of the pedagogical principles applied, but at the same time it is a danger signal pointing to future pathological development.")

314. BUTTERFIELD, *supra* note 17, at 207 ("While Willie was trying to talk with a pretty brown-skinned girl who messed around with Leroy, she insulted Willie, disrespecting him. He slapped her in the face." That was a serious challenge to Leroy. He gave Willie an ultimatum that evening: 'You can fight it out alone with Ricky, or we will both kill you.' Leroy led him up to the roof of their five-story tenement, where Ricky was waiting. Willie knew he was over-matched. When Ricky started throwing punches, there was no time to think. The language of the street was action, and Willie pulled out the gun Charles had given him. Ricky jumped backward in fear, toward the edge of the roof. Willie gave him a kick, knocking him down the narrow air shaft between the building they were on and its neighbor. Leroy turned and ran." ).

315. *See id.* at 142, 144.

316. *Id.* at 142-44.

317. *See id.* at 144 ("Sabrina Gaston, the daughter of the local heroin dealer, watched Willie from her window . . . and saw his face dirty with tears. Once, he went outside, picked up a bottle, and smashed a cat in the head and killed it. She thought he was a very sad and angry boy, lost in his own world."); *see also* MAGID & MCKELVEY, *supra* note 34, at 83 ("Perhaps one of the worst characteristics an unattached child can have is the tendency to be cruel to others or animals.").

Willie James reacted with self-annihilating behavior,<sup>318</sup> one symbolic example of which was killing or hurting others because someone like Laura, on whom he depended to see him when perhaps others couldn't, had already soul-murdered him.<sup>319</sup>

Unfortunately, Patterson's powerful insights do not completely capture Willie James's behavior. From Miller's view, Laura's poison pedagogy had gone too far, especially because she really lacked the ability to bond with Willie James perhaps from the time he was born.<sup>320</sup> And given his deep rage and resentment, Willie James found slights and offenses, where others might not find them. For example, while on an extended leave from a juvenile facility, Willie James got angry because he believed the dry cleaner had damaged his pants.<sup>321</sup> Enraged, he cursed workers and smashed the store's plate glass window. Laura, who had accompanied him, found no damage. Again, after that incident, Laura called Willie James's caseworker, and asked him to take him back to Brookwood, citing that he had not changed.<sup>322</sup>

Thereafter, Willie James continued to clash with people over nothing.<sup>323</sup> Yet, I suspect that his repressed rage and resentment over Laura's refusal to bond with him emotionally caused him to project threats everywhere. Such threats were like ghosts, who were some ubiquitous "they"—everywhere, but nowhere specifically to be found.<sup>324</sup> For him, such ghosts were shadows from his infancy, in

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318. See e.g., BUTTERFIELD, *supra* note 17, at 143 (“[W]hen Laura punished him, he shouted, ‘I hate you. I can’t stand you. I wish you wasn’t my mother. I’m going to jump in front of the subway and kill myself.’ She had to run after him and restrain him from going into the subway station.”). Perhaps the real issue was that when Laura beat Willie James, he felt unloved and may have assumed that he would lose her emotionally or she would abandon him. Far worse, when Laura's lovers beat her, and they often did, Willie James felt as if they would kill her, thus leaving him without any parent, even if her love was cruel and violent. For example, after a fight between Laura and her boyfriend, Willie set his sleeves on fire, and threatened to stab himself. *Id.*

319. *Id.* at 144.

320. *Id.* at 141 (“Laura already had put a brake on her emotions, rationing them out cautiously so she wouldn't get hurt. Now, with Willie turning out like Butch, she withdrew more, putting a distance between herself and her son, a chasm that Willie intuitively felt as a form of rejection.”).

321. *Id.* at 189.

322. *Id.*

323. See *id.*

324. See JANOV, *THE NEW PRIMAL SCREAM*, *supra* note 71, at 59. On this point, Janov writes:

The emotional level cries and sobs, and produces dream images which attempt to contain and circumscribe the pain. The cortex and its thinking mind becomes involved, trying to explain the inexplicable. Because there is a re-representation of the early trauma on this level, there is an attempt to make sense out of the hurt. Without full

which Laura would not, or better yet could not, meet his primal needs for love, nurture, and tenderness. The pain from her emotional abandonment must have seemed to infant Willie James to be everywhere. He could sense her presence like a ghost, but his cries could not get her to come to him, to ease his pain. Perhaps off in the distance, she would shout him down, demand that he shut up and quit crying. If so, her present-absence or her distance shouts would be equally damaging. And so this ghost, this person, was an emotional void, and his cries perhaps also awakened within Laura her own childhood pain after her father abandoned her mother, and she was left to fend for herself during what might have been difficult moments for her mother. In any event, if Laura's childhood pain were awakened, infant Willie James would feel it, internalize it. Her pain became his pain, and he would suffer even more.

Therefore, not the history or impact of slavery and Jim Crow, but Willie James's childhood has lasted his entire adult life.<sup>325</sup>

## CONCLUSION

In effect, Butterfield fails to see that perhaps the darkest secrets, which explain more profoundly the instability of the black family, especially when we consider other factors, must be obedience training and rigid physical violence. This broadly shared cultural norm of beating black children applies to two-parent homes,<sup>326</sup> even though we might see different educational and work success outcomes in such

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access to its source, the cortex does the best it can stretching logic to the irrational. Paranoid reactions are no more than the attempt to focus, without the proper historical information, a distant and inaccessible inner hurt (often compounded by harsh life circumstances). That is what makes the ideation seem so bizarre. The cortex, as the unwitting accomplice, projects those hurts outside: 'They are laughing at me behind my back.' 'They are out to hurt me.' If only he could know who 'they' are.

*Id.*

325. See generally MILLER, *FOR YOUR OWN GOOD*, *supra* note 27, at vii (agreeing with the idea that childhood is the longest age because it stays with a person until death as well as discussing her belief that if irrational emotions such as fear and rage are not taken care of, they can lead to crime or lifelong suffering).

326. See, e.g., GELLES, *supra* note 270, at 13 (arguing that shooting at and missing a child, or throwing objects at them without hitting them, is an abusive act). *But see* Hampton & Gelles, *supra* note 30, at 29:

Both official report data and self-report data find that the risk of child abuse is greater in single-parent households . . . . The rate of very severe violence is significantly greater in single-parent black households than in two-caretaker households. Two-caretaker black households were more likely to report using forms of severe violence toward their children, and this difference is almost entirely due to the higher rate of hitting or trying to hit children with objects in two-caretaker households compared with single-parent homes.

*Id.*

maltreated children. Given Butterfield's own emotional blindness, he omits any deep analysis of Laura who passed her deep fear, rage, and resentment onto Willie James in a way that potentially far outstrips slavery's deadly historical reach. After Laura's mother infected her, she, in turn, poisoned Willie James and his siblings, too. It is not that Butch did not pass onto Willie James some psychogenic potential to become violent and to engage in criminal acts. I would suspect that every emotionally neglected and physically brutalized child might become another Pud, James, Butch, Willie James, Ted Bundy, and Charles Manson. Assuming that is so, it was Laura's emotional neglect and violent abuse that catalyzed Willie James's potential to express his rage and resentment violently and criminally.

Throughout *All God's Children*, Butterfield did not correlate Willie James's violent rage and resentment with the Bosket family's instability. He also did not question whether Pud's, James's, and Butch's childhood maltreatment by fathers and mothers would impact their ability to function productively as adults. Rather, by hypothesizing that slavery, Jim Crow, migration, urban decay, and poor jobs explained why these adults were dysfunctional and engaged in crimes, Butterfield could point out how Aaron, Pud, James, Marie, Frances, Butch, and Laura struggled to make ends meet, and he could presume that insufficient money, the shifting economy, and white racism were pressures that, despite their best intentions, hampered their abilities to do better by their children. That hypothesis dovetails social forces into interpersonal dynamics to explain why Willie James committed violent, criminal acts.<sup>327</sup> In this way, Butterfield agrees with sociologists like Nathan Hare, who in the 1960s attributed the black family's "distortions and pathology" to "slavery and ensuing racism—or racial oppression, in the language of today."<sup>328</sup> Unfortunately, Butterfield, Hare, and other sociologists never considered that perhaps since slavery, black people, especially through obedience training and rigid physical violence, have conditioned their children's consciousness, especially through intergenerational transitions, to co-create the personal experiences and social realities that were literally dying aborning as these parents pounded their dark, violent psyche into

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327. BUTTERFIELD, *supra* note 17, at 252 (continuing to emphasize Saluda, South Carolina's culture of violence as the force that drew Bosket men into criminal acts of violence while discussing Mamon's killing of his girlfriend's brother, who was Butch's cousin).

328. Nathan Hare, *What Black Intellectuals Misunderstand About the Black Family*, BLACK WORLD, Mar. 1976, at 4, 5.

their children.<sup>329</sup> As such, if children experience emotional instability and violence consistently, they believe in an unloving, violent, and unstable world, in which distrust, brutality, and naked self-interest enable them to survive. Unfortunately, the home and family become the primary *locus in quo*, in which the maltreated child like Willie James uses his consciousness to literally recreate or co-create not only instability in the black family but also experiences and realities that require him to vent his fear, rage and resentment.<sup>330</sup>

Until we understand that fear, rage, and resentment co-create personal experiences and social realities, one of which is the instability of the black family, scholars and writers like Butterfield will continue to overlook the power of obedience training and rigid physical violence, not to determine but to condition black children, especially males, to presume that white racism and white structural oppression explain why they cannot prosper in America.<sup>331</sup> By presuming that ubiquitous oppression causes black parents to act violently toward their children, they cannot bring themselves to critically interrogate why blacks broadly subscribe to obedience training and rigid physical violence, which arrived in the Americas from West Africa. By not interrogating this subscription, they cannot begin to fathom why black parents rationalize the breaking of black children. By so rationalizing, these parents presume wrongly that they beat children for their own good, when in truth they brutalize their children because they were brutalized, demeaned, and manipulated, too.<sup>332</sup> Such brutalization at

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329. Cf. MILLER, *FOR YOUR OWN GOOD*, *supra* note 27, at 66 (“If the children then showed signs of violent behavior in adolescence, they were expressing both the unlived side of their own childhood as well as the unlived, suppressed, and hidden side of their parents’ psyche, perceived only by the children themselves.”).

330. Cf. AMIT GOSWAMI ET AL., *THE SELF-AWARE UNIVERSE: HOW CONSCIOUSNESS CREATES THE MATERIAL WORLD* 10-11 (1993) (“[E]verything (including matter) exists in and is manipulated from consciousness. . . . [P]hilosophy does not say that matter is unreal but that reality of matter is secondary to that of consciousness, which itself is the ground of all being—including matter.”); ESTHER HICKS & JERRY HICKS, *THE LAW OF ATTRACTION: THE TEACHINGS OF ABRAHAM* 77 (2006) (“We know that you are not inviting, attracting, or creating it—on purpose. But we will say to you that you are the inviter, the attractor, and the creator of it . . . because you are doing it by giving thought to it. By *default*, you are offering your thought, and then the Laws that you do not understand are responding to your thought, causing results that you do not understand.”)

331. Cf. Carolyn M. West, *Battered, Black, and Blue: An Overview of Violence in the Lives of Black Women*, in *VIOLENCE IN THE LIVES OF BLACK WOMEN: BATTERED, BLACK, AND BLUE* 5, 20 (Carol M. West ed., 2002) (“A pro-Black and pro-feminist dialogue requires us to acknowledge Black women’s victimization and to acknowledge the oppression of Black men, while simultaneously holding them accountable for their violence.”).

332. See MILLER, *FOR YOUR OWN GOOD*, *supra* note 27, at 96-102 (arguing that parents tend to do to their children what was done to them, even though they fundamentally believe that they are acting in the best interest and welfare of their children).

the very least conditions the maltreated child's consciousness to see what is not there as did Willie James and to fault not their abusive parents but the socialized other, which for blacks is whites, white racism, or white structural oppression.

Yet, if white structural oppression were so deterministic, it would perforce deny blacks or other historically marginalized people ways in which to better themselves. Fortunately, that is not true. After all, even in 1899, when Du Bois wrote *The Philadelphia Negro*, he acknowledged that most blacks were living in intact marriages with children who they supported. Today, blacks still cynically project fault on America by arguing that the advent of Barack Obama's presidency has not ushered us into *post-racialism*. Of course, it hasn't. Fortunately, it is also clear that if blacks wish to succeed they can. For example, Butch earned a Phi Beta Kappa key while he served his sentence.<sup>333</sup> Before garnering that important accolade, he took personal responsibility for his life, he got serious about becoming a scholar, he studied yoga, and he became a vegetarian.<sup>334</sup> At this point, he declared: "'Butch' is dead."<sup>335</sup> Butch attributed his sociopathic behavior to past environment,<sup>336</sup> and he acknowledged that that he did "not miss him at all."<sup>337</sup>

Unfortunately, Butch never exhumed his childhood history, so that he could understand that his fear, rage, and resentment had little to do with exploitative capitalists or sociopathic racists but with Marie, Frances, and James, his father's brutal maltreatment, which he would rather project not onto his blood caregivers but onto an appropriate external nemesis—white otherness.<sup>338</sup> And when he did direct his rage, resentment, and thus criminal violence at Marie's neglect,<sup>339</sup> it lacked visceral, existential force, e.g., anger. He declared his rage a monster,<sup>340</sup> perhaps little different from in-born evil. As a result, he still continued to compartmentalize and thus repress his childhood

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333. BUTTERFIELD, *supra* note 17, at 249.

334. *Id.* at 244-45.

335. *Id.* at 245.

336. *Id.*

337. *Id.*

338. *See id.* at 248 ("One day when [Roger Barnes, who taught sociology at Leavenworth, and he] were discussing how capitalists exploited people, Butch said, 'Just line the motherfuckers up and kill them.'").

339. BUTTERFIELD, *supra* note 17, at 253.

340. *Id.* ("I've been battling the same monsters [as my son Willie James] all my life.").

maltreatment experiences.<sup>341</sup> And when he finally decided to write to Willie James,<sup>342</sup> he thus could not encourage his son to deeply explore how Laura's neglect and brutalizing trauma had filled him with rage and resentment. Rather, he encouraged him to develop internal, cognitive adjustments, and to get an education.<sup>343</sup> They eventually talked by phone;<sup>344</sup> in Willie James's mind, it was an unremarkable event.<sup>345</sup> Having never mined his own childhood for its maltreatment so that he could overcome his own emotional blindness, having not repressed his natural feelings of rage and resentment, and properly faulted Marie, Frances, and James, Butch could never urge Willie James down that existential rabbit hole, where his deepest emotions lie and where the darkest secrets of the origins of black oppression lay waiting for a truly courageous hero.

In truth, so long as he remained dissociated from his childhood history, Willie James could not be that hero. That hero must embrace the quest to enter his own underworld, where he must encounter his darkest secrets and deepest fears, and if they do not kill him existentially, he will return to him and shown to the world a person who can bring the treasure of wisdom unto it.<sup>346</sup> To do so, Willie James would have had to forge his own inner wall, *viz.*, his defense mechanism,<sup>347</sup> behind which he had hidden since he had suffered maltreatment at the hands of his caregivers and by which he had defended his inner child against all comers, including innocent surrogates.<sup>348</sup> And once over

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341. *Id.* at 248 (writing about Tom White, a psychologist who worked at Leavenworth, who observed: "Butch had a great ability to compartmentalize. He was able totally to believe whatever he was saying at the moment, which made him very convincing to others. . . . That was what you had to do in prison to survive. You had to be selfish and something of a psychopath.").

342. *Id.* at 253.

343. *Id.* ("[H]e urged him to get his high school equivalency degree. He also suggested Willie get into yoga and a regular physical fitness program as a way to discipline himself. Scholarship, reason, and control, Butch wrote, were absolutely essential to preventing a violent outburst that could result in more time in prison.").

344. *Id.* at 254-55.

345. *Id.* at 255.

346. See generally JOSEPH CAMPBELL, *THE HERO WITH A THOUSAND FACES* (3d prtg. 1973) (using ancient myths to examine man's struggle for identity).

347. See MILLER, *FREE FROM LIES*, *supra* note 81, at 11. On this point, Miller states:

[I]n adulthood, the combination of infant confusion and the denial of suffering obviously instills reluctance or downright refusal to reflect on the problem posed by inflicting physical punishment on small children. *Mental blockades* (and the fear underlying them) prevent us from asking ourselves how this confusion originated in the first place. Accordingly, we fend off everything that would lead to such reflection. (emphasis added).

*Id.*

348. See JANOV, *WHY YOU GET SICK*, *supra* note 69, at 20. Survival and continuity do not end the neurotic suffering. His needs "continue through life, exerting a persistent, unconscious force toward the satisfaction of those needs. But because the needs have been suppressed in the

those walls, Willie James would have found what had eluded him while at the mercy of his well-intentioned but soul-murdering caregivers—bliss and life’s open doors.<sup>349</sup> And Butch, still emotionally blind and repressing his existential force, he could not ignite this heroic quest in his son. Without that force, Willie James would thus simply reject his father and shrug off his advice. Although he needed that advice, he still had a deep fear of learning and formal education,<sup>350</sup> which perhaps meant that he feared awakening his inner wisdom, too. Rather than an experienced adult from whom he might learn anything, Willie James needed to think of his father as “a big-time criminal, a bad-ass dude, a real stone killer.”<sup>351</sup> For this reason, Willie James wanted not books and good-boy advice from his father,<sup>352</sup> but a James Cagney-like order to bust him out of Goshen, a juvenile facility.<sup>353</sup> Once out, they would be “a great pair of bank robbers. . . . Better than Jesse James and his brother.”<sup>354</sup> That is Hollywood’s anti-hero. And so, Willie James, still emotionally blind and without an “enlightened witness,”<sup>355</sup> had to either take his fa-

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consciousness, the individual must pursue substitute gratification. Because he was not allowed to express himself as an infant, he may be compelled to try to get others to listen and understand later in life.” *Id.*

349. *Cf.* JOSEPH CAMPBELL WITH BILL MOYER, *THE POWER OF MYTH* 120-21 (Betty Sue Flowers ed., 1988) (“If you do follow your bliss, you put yourself on a kind of track that has been there all the while, waiting for you, and the life that you ought to be living is the one you are living. . . . Wherever you are—if you are following your bliss, you are enjoying that refreshment, that life within you, all the time.”).

350. BUTTERFIELD, *supra* note 17, at 253 (Although Butch had urged his son to get his high school equivalency degree, Willie James, while impressed with his father’s erudition, “hated school.”).

351. *Id.* at 254.

352. *Id.* at 260. Actually, Willie James thought his father was a punk, had gone soft. “He had expected his father to be a big-time criminal, but Butch was only a punk, in Willie’s eyes, with his sermons about school and staying out of trouble.” *Id.* His rage amplified by years of disappointment, Willie James thought he “was now tougher than his father.” *Id.* at 260-61. Neither fearing beatings or threats nor the need to respect him, he put letter talk with his father Butch “to a wrathful end.” *Id.* In a high, disdainful tone, Willie James wrote in October 1982:

No. 1—I’m not a child. These cracker devils stole my youth when I was 9 years old and sent me to jail. So don’t be dictating your sarcastic bullshit to me as if I’m a child.

No. 2—You sound to me like you been down too long, getting too old, and starting to go soft, in other words, you sound like a “House Nigger.” (Institutionalized and your spirit gone.)

I have come to see you for what you really are, a petty, phony ass, house nigger. I’ve gone 19 years so far without you, asshole. I know I can go the rest of the way without you. Forget I ever existed man, cause that’s the way I feel about you.

*Id.* at 261.

353. *Id.* at 254.

354. *Id.*

355. MILLER, *THE TRUTH WILL SET YOU FREE*, *supra* note 136, at x-xi (“In adult life, a role similar to that of childhood’s helping witness may be taken over by an enlightened witness. By this I mean someone who is aware of the consequences that neglect and cruelty in childhood can have. Enlightened witnesses support these harmed individuals, empathize with them, and help



ther's advice, which was useless to him, or stay put until he found an existential rabbit hole into which he could fall, so that he could learn to express his rage and resent without hurting himself or others. Unfortunately, Willie James, the anti-hero, later broke out of Goshen, only to be caught by state police two hours later in a gravel pit, frozen blue, and shaken by the cold. Yet, at age sixteen, his breakdown became an adult crime, and the judge sentenced him to four years in state prison.<sup>356</sup>

Who made Willie James? Had Marie loved Butch, who could he have become? Had Frances not traumatized him, what company might he have run or founded? Had James not brutalized him, would the repressed rage and resentment within him have exploded, causing him to kill two human beings?<sup>357</sup> Had Laura bonded with infant Willie James, and had not thrown him into the juvenile justice system as a status offender, would his deep, primal rage and resentment have morphed him into an antisocial personality?

None of us knows the answers, except that Butch did earn a Phi Beta Kappa key while in prison.<sup>358</sup> That fact suggests that like Willie James, Butch's "potentiality"<sup>359</sup>—his arc of greatness—was not limited by slavery, Jim Crow, or white racism.<sup>360</sup> In truth, those social forces can make life and opportunities both difficult and scarce for blacks and other historically oppressed people. What is clear is that the Bosket men, especially those who became "bad niggers," were severely maltreated, and what was done to them had been done to those who were maltreating them.<sup>361</sup> That is the power and reach of slavery;

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them gain an understanding of their feelings of anxiety and powerlessness as products of their own history rather than as some frightening, mysterious force.").

356. BUTTERFIELD, *supra* note 17, at 256.

357. *Id.* at xii.

358. *Id.* at 249.

359. See BUTTERFIELD, *supra* note 17, at 249-50 ("Butch's professors deluged the Federal Parole Commission with letters of support. 'Few people have impressed me as much as Mr. Bosket in terms of his intellectual intensity, his commitment and his drive,' said Professor McNall, the chairman of the sociology department. Robert Antonio, another of his professors, wrote of Butch: 'He is one of those very rare students who has the combined traits—high intelligence, diligence and enthusiasm—which provide a potentiality for high level scholarship. . . . He recently came within two letter grades of compiling a perfect undergraduate point average. This is a most difficult and rare accomplishment!'); ROLLO MAY, *THE DISCOVERY OF BEING: WRITINGS IN EXISTENTIAL PSYCHOLOGY* 17 (1983) ("These potentialities will be partly shared with other persons but will in every case form a unique pattern in each individual.").

360. See BUTTERFIELD, *supra* note 17, at 249 ("On January 11, 1980, the University of Kansas awarded him a bachelor of arts degree 'With Highest Distinction,' their equivalent of *summa cum laude*. He had finished in the top 3 percent of his class.").

361. MILLER, *BANISHED KNOWLEDGE*, *supra* note 36, at 2-3 ("[Maltreated parents] will not remember the torments to which they were once exposed, because those torments, together with

however, to be clear, obedience training and rigid physical violence predate American Negro slavery. West African societies, like others around the world, believe in breaking an infant's and toddler's natural will, or what Miller calls vitality, spontaneity, and authenticity. In part, Butterfield's powerful work reveals that a near internecine war has been waged between black mothers and their sons,<sup>362</sup> resulting not just in "bad ass" Bosket men, but also in young Willie James.<sup>363</sup>

It would thus appear that the modern America black family, while perhaps at the mercy of a number of different social forces, truly suffers instability first and foremost from an inner force, which has been, and remains, obedience training and rigid physical violence. Now, if we place that family within the social maelstrom of racism, however subtle, the children will perhaps not fare too well, especially if they, due to emotional blindness, take greater comfort not in faulting their caregivers, but in attracting to them confirmatory personal experiences and social realities like racism that rationalize why their caregivers brutalized them.<sup>364</sup> All too often, we have heard: "*I was a bad child, and I'm glad my mother slapped me hard in the face because, if not, I'd not be the professional I am today.*"<sup>365</sup> As a result, without the benefit of helping or "enlightened witnesses," they just might become another Willie James Bosket.

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the needs related to them, have all been repressed: that is, completely banished from consciousness.").

362. Cf. LEON SHASKOLSKY SHELEFF, GENERATIONS APART: ADULT HOSTILITY TO YOUTH 3 (1982) (focusing on the "parental and adult hostility toward the young: the hostility of a dominant group in society to one of its most vulnerable groups, the hostility of those entrusted with the care of infants, children and youth toward the purported beneficiaries of that care").

363. See STRAUS WITH DONNELLY, *supra* note 5, at 117 ("It is virtually certain that part of the link between corporal punishment and crime occurs because 'bad' children are hit and then go on to have a higher rate of criminal activity than other children.").

364. See ROBERTS, *supra* note 17, at xvi. According to Roberts, Seth states:

Experience is the product of the mind, the spirit, conscious thoughts and feelings . . . . These together form the reality that you know. You are hardly at the mercy of a reality, therefore, that exists apart from yourself, or is thrust upon you. You are so intimately connected with the physical events composing your life experience that often you cannot distinguish between the seemingly material occurrences and the thoughts, expectations and desires that gave them birth.

*Id.*

365. See STRAUS WITH DONNELLY, *supra* note 5, at 116 ("At the 1993 annual meeting of the Eastern Sociological Society, two of the most respected African-American social scientists, Elija Anderson and Charles Willie, both said, 'I was whupped, and I'm OK.'").

# “Colonial White Mater Privilege”: An Above-Ground Railroad to Freedom and Land Reclamation\*

CYNTHIA HAWKINS DEBOSE\*\*

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\* As will be discussed in this article, the term “Colonial White Mater Privilege” and the concept that this privilege is “An Above-Ground Railroad to Freedom” (through the United States judicial system) is an alternate route to freedom than the more commonly known “underground-railroad.” The author has coined these terms and phrases for the first time in this article. The author shall utilize the terms Black and White as racial categorizations where appropriate. However, internal references within quotations will maintain their original phraseology and spelling.

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*“[A]ll the Issues of English or other Freeborne woemen that have already married [sic] Negroes shall serve the Masters of their Parents till they be Thirty years of age and noe longer.”*

—An Act Concerning Negroes & Other Slaves<sup>1</sup>

*“A marriage between a person of free condition and a slave, or between a white person and a [N]egro, or between a white person and a mulatto, shall be null.”*

—Thomas Jefferson<sup>2</sup>

*Manifestly, it is for the peace and happiness of the black race, as well as of the white, that [anti-miscegenation] laws should exist. And surely there can not be any tyranny or injustice in requiring both alike, to form this union [marriage] with those of their own race only, whom God hath joined together by indelible peculiarities, which declare that He has made the two races distinct.*

—Justice Manning<sup>3</sup>

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1. An Act Concerning Negroes and Other Slaves, 1 MD. ARCHIVES 533-534 (1664) (“The 1664 Act”).

2. KAREN WOODS WEIERMAN, ONE NATION, ONE BLOOD: INTERRACIAL MARRIAGE IN AMERICAN FICTION, SCANDAL, AND LAW, 1820-1870, at 131 (2005) (quoting a bill drafted by Thomas Jefferson) (citation omitted).

3. *Green v. State*, 58 Ala. 190, 195 (1877). The Supreme Court of Alabama upheld the State of Alabama’s 1876 anti-miscegenation law, and the indictment of a Negro man, Aaron Green, and a white woman, Julia Atkinson (Green), who intermarried “with each other against the peace.” *Id.* at 190-91, 197.

“Colonial White Mater Privilege”

*“The years of slavery did more than retard the progress of blacks. Even a greater wrong was done to the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race.”*

—Justice William O. Douglas<sup>4</sup>

INTRODUCTION

There is no mistaking the fact that this Article provides a unique analysis of anti-miscegenation case law from the Colonial Period; however, this Article also has great personal significance. As long as I can recall, I heard the whispered “tayles” of Elizabeth Shorter (born 1662) and Eveline Hawkins (born 1787)—the earliest traceable female ancestors of my paternal line. They were both alleged to be White women of some means who created the much intermingled Shorter-Hawkins Clan from Tee Bee, Maryland. The two matriarchs are my ancestors dating back twelve and six generations, respectively; however, both of these strong limbs end at the shores of the United States.<sup>5</sup> On the other hand, due to family discord, estrangement and death, the author’s maternal line (originating in Georgia and South Carolina) has been lost after four and five generations.<sup>6</sup>

Growing up in the Upper Northwest Washington quadrant of the District of Columbia—as at least an eighth generation born and bred native of the region—I had a host of relatives. Our summers and holidays consisted of at least one foray “way-down-in-the-country” to spend time with my father’s relatives. We were definitely the “city mice” in this family saga. Bobby, as my dad was affectionately called by all, was also the “baby” and darling of the eight children of Mortimer and Eleanor Hawkins. Our attendance at these events was absolutely mandatory. The annual family reunions (there were always two per year—the Shorter’s and the Hawkins’—two very close and inter-related clans with many so-called “double cousins”<sup>7</sup>) were held at the

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4. *DeFunis v. Odegaard*, 416 U.S. 312, 336 (1974) (Douglas, J., dissenting).

5. Recently, as the result of research conducted for this Article, the author has culled details potentially relating to Elizabeth Shorter’s birth and baptism in London, England. However, since the information has not been verified, it is not the subject of this Article.

6. Figuratively, the Knox family tree has been chain-sawed near the base of its trunk, and although there is “family folklore” of being descendants of Native Americans, the author has not been able to trace the Knox family history any farther back than five generations. See *infra* App. C. Thus, that history is not a subject of this Article.

7. The phenomenon of “double cousins” occurs when, for example, sisters from one family marry brothers of another family. There are several instances of this type of intermarrying between the Hawkins and Shorter clans (there is even a relative named “Shorter Hawkins”).

two family churches on the “family land.” Shorter reunions were held at Grace Methodist Church in Chapel Hill, Maryland, and Hawkins reunions were held at Union Bethel AME Church in Tee Bee, Maryland. At these reunions, the pictures would be displayed, cemetery plots would be visited, and during a humongous picnic with much conversation and conviviality—both history and “herstory” would be told.

There was talk of a lawsuit hundreds of years ago. However, with a lack of modern research technology and the daunting task of manual genealogical research (which was extremely difficult for African American descendants), in the 1960s and 1970s, no one seemed to have the details of the lawsuit, but we were standing on the land that was the subject of the case.<sup>8</sup>

As descendants of free landowners, the various members of the Hawkins and Shorter clans were proud of the historical thousands of acres of land that had been passed down through centuries along with their ancestors’ freedom.<sup>9</sup> At the time, as a young child and as a teenager, I had no real idea of what the adults were talking about—I just wanted to “run wild” over the great expanses with my cousins who were from “down-in-the-country” as we called it and were claimed to look “just like Aunt so-and-so” and “cousin what’s-her-name.”<sup>10</sup> Although the desire to write this Article and work on this overall project was instilled in me as a child—it has taken me years of genealogical research to capture the misty whispered oral history and reformulate steam and smoke into written word.

Now, at long last, after decades of familial musing and reminiscence, I am presenting a portion of my long-term project for the first time. This Article discusses the utilization of “Colonial White Mater Privilege” (a term I have coined) by mulatto descendants of a White matriarch to regain their freedom and property rights. As will be il-

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8. See generally *Sprigg v. Negro Mary*, 3 H. & J. 491 (Md. 1814) (from Fredrick and Washington counties); *Shorter v. Boswell*, 2 H. & J. 359 (Md. 1808) (from Saint Mary and Charles counties); *Shorter v. Rozier*, 3 H. & McH. 238 (Md. 1794) (from Saint Mary and Charles counties). The author will never forget the day in 1995, due to the expanded technology of the internet and “Westlaw” access, as a newly-minted law professor teaching a course on Race and the Law that she searched for, found, downloaded, and read these cases for the first time.

9. As an aside, in the 1980s, the author’s father and his siblings sold their portions of the Shorter land located in Brandywine, Prince George’s County, Maryland that had been deeded to them upon their mother’s (Margaret Eleanor Shorter Hawkins) death in 1977.

10. Then there was the added tut-tutting (out of my mother’s hearing, of course)—“. . . too bad, Bobby’s [three] girls didn’t inherit the Shorter family trait of hazel eyes . . . .”

“Colonial White Mater Privilege”

lustrated,<sup>11</sup> when a descendant of a non-slave White female ancestor claimed “Colonial White Mater Privilege” in their petition for freedom (and/or land reclamation suit), the petitioner asserting “Colonial White Mater Privilege” was successful and gained their freedom. It is notable that in several cases, as discussed in Part V, *infra*, a descendant who claims Colonial Mater Privilege prevailed—despite the fact that her ancestor who *did not* assert the privilege (but could have) failed to, and was therefore denied her freedom. The purpose of this Article is to introduce and provide a partial test of my theory. To this end, in this Article, I rely on case law and statutes from the State of Maryland to explain and test my theory. This Article serves as a “place-holder” for future research and application of my theory.

Part I discusses the applicable anti-miscegenation statutes. Part II presents my theory of Colonial White Mater Privilege. Part III discusses race-mixing in Colonial Maryland. Part IV presents the “Tayles of the Whyte Matriarchs,” providing history and related cases involving the author’s ancestry, which is the original basis for the author’s theory. Part V tests the theory through seventeen applicable Maryland state cases from the 1700s and 1800s. Part VI illustrates how, despite the freedom and land reclamation lawsuits from the 1700s and 1800s, economic disparity for the Black family continues into the 21st Century.

## I. ANTI-MISCEGENATION STATUTES

Miscegenation statutes are a uniquely American legal “invention”—such laws did not exist in the English common law, these laws began to be enacted in the Colonies in the mid-1600s.<sup>12</sup> From the establishment of the United States Colonies and through the birth of this Nation, the legal stance on anti-miscegenation and “race mixing to muddle whyte blood” and to prevent “an abominable mixture” was clear—it was legally taboo.<sup>13</sup> The Province of Maryland (the focus of this Article) passed the first anti-miscegenation statute in the “New World” in 1661.<sup>14</sup> However, bi-racial marriages and assignations re-

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11. *See infra* Part V.

12. SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY 114 (Martha Hodes ed., 1999). Further, during the Early and Middle Ages of Europe, the concept of race being used in a judgmental manner was nonexistent. *See* RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 17 (2000).

13. *See, e.g.*, The 1664 Act, *supra* note 1.

14. *See id.*

sulting in so-called mulatto children were nearly pervasive.<sup>15</sup> The increase in Black-White assignations (both voluntary and forced) undoubtedly increased as the slave population in the Colonies increased.<sup>16</sup>

For example, ironically, during the time that Thomas Jefferson wrote his [in]famous *Notes on the State of Virginia* (1781) pontificating about the biological difference of the Negro, their innate inferiority and, the call for racial purity,<sup>17</sup> Sally Hemings, a mulatto slave was serving as Jefferson’s alter-life-partner. Hemings was the half-sister of

15. Some estimate that in 1850, thirty-seven percent of the free Negro population in the United States was of mixed-race heritage. See EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD SLAVES MADE* 414 (1974). “There was probably more black-white sex during this period [1660s to the 1860s] than at any other time (thus far) in American history.” RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 41 (2003). “[O]ne-fifth of children borne out of wedlock at the end of the seventeenth century were mulattoes.” RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 20 (2001); see also A. LEON HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR RACE AND THE LEGAL AMERICAN PROCESS-THE COLONIAL PERIOD* 42 (1978) [hereinafter HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR*] (discussing the black experience in colonial America).

16. Estimates of the slave versus white population in Maryland during the 1700s are as follows:

Year	Slaves	Whites
1704	4,475	30,537
1710	7,935	34,796
1712	8,330	34,796
1719	25,000	55,000
1748	36,000	55,000+
1756	46,225	107,963
1761	49,675	107,963+
1782	83,985	170,688
1787	80,000	170,688+
1790	103,036	319,726

ELIZABETH DONNAN, *DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF THE SLAVE TRADE TO AMERICA* VOL. IV, at 2 (Octagon Books 1969) (1935). Estimates of the numbers of non-slave Negroes in the United States are as follows: in 1790, there were 59,557 free Negroes (7.9% of the total black population), in 1860 there were 488,070 (11% of the total black population). See BENJAMIN QUARLES, *THE NEGRO IN THE MAKING OF AMERICA* 101 (1964).

17. Thomas Jefferson included the following in his *Notes on the State of Virginia*:

The differences [between the races] is fixed in nature . . . comparing them by their faculties of memory, reason, and imagination, it appears to me, that in memory they are equal to the whites; reason, much inferior; . . . and that in imagination they are dull, tasteless, and anomalous . . . they are at least as brave, and more adventuresome. But this may perhaps proceed from a want of forethought, which prevents their seeing a danger till it is present . . . their griefs are transient.

Thomas Jefferson, *Notes on the State of Virginia* (1781) as reprinted in ROBINSON, *supra* note 12, at 49-51.



Jefferson’s wife.<sup>18</sup> It has been documented that over the years, Thomas Jefferson had four or five children with Hemings.<sup>19</sup>

In 1815, Jefferson defined a mulatto as “one-fourth crossing of Negro blood with White blood,” which was a so-called “quadroon” or what Thomas Jefferson referred to as a “quarteroon.”<sup>20</sup> However, a person with one-sixteenth of the “muddy blood” would be considered “pure white [and] cleared of the Negro blood” and automatically free and a citizen of the United States.<sup>21</sup> To explain this concept, use the

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18. See generally ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS: AN AMERICAN CONTROVERSY (1997) [hereinafter GORDON-REED, THOMAS JEFFERSON AND SALLY HEMINGS] (detailing the relationship between Jefferson and Hemings).

19. See *id.* at 245-48 (The Memoirs of Madison Hemings (son of Jefferson and Hemings)); KENNEDY, *supra* note 15, at 50-59; GARRY WILLS, “NEGRO PRESIDENT”-JEFFERSON AND THE SLAVE POWER 4-5 (2003); Letter from Ellen Randolph Coolidge, Thomas Jefferson’s granddaughter, to Joseph Coolidge, her husband (Oct. 24, 1858), available at <http://www.pbs.org/wgbh/pages/frontline/shows/jefferson/cron/1858ellenlett.html>.

20. Letter to Francis C. Gray, Esq. (Mar. 4, 1815), in THE WRITINGS OF THOMAS JEFFERSON (H.A. Washington, ed., H.W. Derby Press 1861), available at <http://yamaguchy.com/library/jefferson/1815.html>. Despite Jefferson’s definition, in 1785, the Virginia Legislature voted to change the legal definition of mulatto to “one-fourth or more of Negro blood.” This change, by operation of law, created white persons out of those with less of a Negro blood quantum—like the octoroon. Under the former 1705 statute, these octoroons were merely mulattoes—and not white persons. See A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 39 (1996) [hereinafter HIGGINBOTHAM, JR., SHADES OF FREEDOM]. Mulatto is defined as: “[t]he first-generation offspring of a black and a white person.” *Mulatto Definition*, MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/mulatto> (last visited Jan. 1, 2005); see also INTERRACIALISM: BLACK-WHITE INTERMARRIAGE IN AMERICAN HISTORY, LITERATURE, AND LAW 212-14 (Werner Sollors ed., 2000) [hereinafter INTERRACIALISM]; MIXED RACE AMERICA AND THE LAW: A READER 105 (Kevin R. Johnson ed., 2003). In addition, quadroon is defined as: “[t]he offspring of a mulatto and a white person.” *Quadroon Definition*, MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.lexic.us/definition-of/Quadroon> (last visited Nov. 1, 2011); INTERRACIALISM, *supra*, at 214-15. Moreover, octoroon is defined as: “[a] person of one-eighth black ancestry.” *Octoroon Definition*, MERRIAM WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/octroon> (last visited Nov. 1, 2011); INTERRACIALISM, *supra*, at 215-16.

Every person whose grandfathers or grandmothers any one is, or shall have been a negro, although all his other progenitors, except that descending from the negro, shall have been white persons, shall be deemed a mulatto; and so every other person who shall have one-fourth part or more of negro blood, shall, in like manner, be deemed a mulatto.

An Act Declaring What Persons Shall Be Deemed Mulattoes, 4 LAWS OF VA. 184 (1785), available at <http://vagenweb.org/hening/vol12-08.htm>. Thus, as of 1785, in colonial Virginia, a mulatto was defined as having one-fourth Negro blood. *Id.* Those persons with less than a quantum of Negro blood were thereby deemed legally white. *Id.* Any children born by Sally Hemings to Thomas Jefferson would have had one-eighth of a quantum of Negro blood (referred to as an octoroon)—as Sally Hemings was a quadroon (one-fourth Negro blood). See ANNETTE GORDON-REED, THE HEMINGSSES OF MONTICELLO: AN AMERICAN FAMILY 597-99 (2008) [hereinafter GORDON-REED, THE HEMINGSSES OF MONTICELLO] (discussing the life and times of the Hemings family).

21. Act to Preserve Racial Integrity of 1924, reprinted in INTERRACIALISM, *supra* note 20, at 23-24. This is the 1924 version of Virginia’s colonial-era blood quantum statute following the “one-drop” (hypodescent) rule against any quantum of non-Caucasian blood (first enacted after the 1785 Act Declaring What Persons Shall Be Deemed Mulattoes. See *supra* note 19 and ac-

following equation: one-sixteenth Black = White with Black → one-half Black (mulatto) with White → one-fourth Black (quadroon) with White → one-eighth Black (octoroon) with White = one-sixteenth Black; therefore, for the resultant one-sixteenth Black child, one great-great-grand-parent was Black, while all remaining direct ancestors were White.<sup>22</sup>

By the way—Jefferson’s children with Sally Hemings met the ultimate test for Whiteness—namely, living as or passing for a White person in the world at large. At least two of these children “left” Monticello, married White spouses and lived their lives passing as White persons.<sup>23</sup> However, their “country” cousins who remained behind at Monticello did not fare so well—but that discussion is beyond the scope of this Article.<sup>24</sup>

During the United States’ Colonial period, one example of an anti-miscegenation statute was worded as follows: “[A]ll the Issues of English or other Freeborne woemen that have already married Negroes shall serve the Masters of their Parents till they be Thirty years of age and noe longer.”<sup>25</sup> Another was worded:

And for prevention of that abominable mixture and spurious issue which hereafter may increase in this dominion, as well by negroes, mulattoes, and Indians intermarrying with English, or other white women, as by their unlawful accompanying with one another, Be it enacted by the authorities aforesaid, and it is hereby enacted, that

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companying text (quoting the language of the 1785 Act, which the Virginia Act recites). The Act to Preserve Racial Integrity states:

5. It shall hereafter be unlawful for any white person in this state to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this Act, the term ‘white person’ shall apply only to the persons who have no trace whatsoever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasian blood shall be deemed to be white persons.

INTERRACIALISM, *supra* note 20, at 20; see HIGGINBOTHAM, JR., *SHADES OF FREEDOM*, *supra* note 20, at 39. A later version of this statute was the subject of the United States Supreme Court case of *Loving v. Virginia*, 388 U.S. 1, 5 (1967).

22. See INTERRACIALISM, *supra* note 20, at 91.

23. See also GORDON-REED, *THE HEMINGSSES OF MONTICELLO*, *supra* note 20, at 13. In “1822—Beverley [Jefferson and Hemmings’ first son to live to adulthood] and Harriett leave Monticello to live as white people.” *Id.*

Three of the four children [TJ was their father] Sally Hemings reared to adulthood lived successfully as white people among other whites. Her two eldest, Beverley and Harriett, left Monticello as white people. . . . They married white people who may not have known they were of African origin or had ever been enslaved.

*Id.* at 285.

24. See INTERRACIALISM, *supra* note 20, at 53; *Thomas Jefferson and Sally Hemings: A Brief Account*, MONTICELLO.ORG, <http://www.monticello.org/site/plantation-and-slavery/thomas-jefferson-and-sally-hemings-brief-account> (last visited Nov. 1, 2011).

25. An Act Concerning Negroes and Slaves, 7 MD. ARCHIVES 203-205 (1681).

“Colonial White Mater Privilege”

for the time to come, whatsoever English or other white man or woman being free shall intermarry with a negroe, mulatto, or Indian man or woman bond or free shall within three months after such marriage be banished and removed from this dominion forever.

—An Act for Suppressing Outlying Slaves.<sup>26</sup>

II. THESIS—COLONIAL WHITE MATER PRIVILEGE

My thesis is that the significant occurrence of inter-racial marriage in Colonial Maryland—despite and in the face of the anti-miscegenation laws (which made marrying a black man and bearing his children a crime) and their penalties—white mothers were seeking to use and instill white privilege upon their bi-racial (referred to as a mulatto) children for the best interest of their child. I have coined this action by white mothers, of legally creating white children, out of so-called mulatto children who society wanted to enslave as—“Colonial White Mater Privilege.”

In general, regardless of the attendant time-period, white privilege can be succinctly defined as “the myriad advantages that White people enjoy on a daily basis that racial minorities do not.”<sup>27</sup> Some have termed it “an invisible package of unearned assets” or entitlements that can be relied upon daily.<sup>28</sup> Ian Haney Lopez has gone further to state that “White identity provides material and spiritual assurances of superiority in a crowded society” and that these “[p]resumptions of worth accompany Whiteness.”<sup>29</sup> Conversely, “[b]elief in non-Caucasian inferiority is a comforting rationale for discrimination in a purportedly equalitarian society.”<sup>30</sup> During the Colonial period, these privileges were clearly a matter of slavery or freedom and life or death.

Justice William O. Douglas, in his dissenting opinion in *DeFunis v. Odegarrrd*, summed up White privilege as follows: “The years of slavery did more than retard the progress of blacks. Even a greater

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26. An Act for Suppressing Outlying Slaves, Act XVI, 3 LAWS OF VA. 87 (1691), available at <http://vagenweb.org/hening/vol03-06.htm>.

27. Ashleigh Shelby Rosette & Tracy L. Dumas, *The Hair Dilemma: Conform to Mainstream Expectations or Emphasize Racial Identity*, 14 DUKE J. GENDER L. & POL’Y 407, 418 (2007).

28. Peggy McIntosh, *White Privilege: Unpacking the Invisible Backpack*, in BEYOND HEROES AND HOLIDAYS: A PRACTICAL GUIDE TO K-12 ANTI-RACIST, MULTICULTURAL EDUCATION AND STAFF DEVELOPMENT 83 (Enid Lee et al. eds., AK Press 2d ed. 2007).

29. IAN HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* 140 (Richard Delgado & Jean Stefancic eds., New York Univ. Press 10th anniv. rev. ed. 2006) (1996).

30. Note, *Constitutionality of Anti-Miscegenation Statutes*, 58 YALE L.J. 472, 472 (1949).

wrong was done to the whites by creating arrogance instead of humility and by encouraging the growth of the fiction of a superior race.”<sup>31</sup>

The Naturalization Act of 1790 codified that United States citizenship could only be for free White persons; while Article I, section 2 of the United States Constitution provided that the census shall count “the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.”<sup>32</sup>

A landmark example of case law implementing this privilege of citizenship is, of course, the case of *Dred Scott v. Sandford* where the U.S. Supreme Court held that all Blacks, either enslaved or free, were not and could not be U.S. citizens.<sup>33</sup> The decision, thus, refused Blacks the ultimate privilege.

### III. COLONIAL MARYLAND: A MIXING OF THE RACES

Extensive research by Paul Heinegg reveals that during the colonial period in Maryland: most free African Americans descended from white women who had mixed-race children by African American men.<sup>34</sup> Fewer owned land than did their counterparts in Delaware, Virginia, and North Carolina;<sup>35</sup> they had closer relations with the slave population than did their counterparts in Delaware, Virginia and North Carolina.<sup>36</sup> Although some claim Native American ancestry, the evidence indicates that most are direct descendants of mixed-race children of white women<sup>37</sup> and that some free African Americans migrated to Delaware and Virginia where there were more opportunities for land ownership.<sup>38</sup>

In addition,

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31. *DeFunis v. Odegaard*, 416 U.S. 312, 336 (1974) (Douglas, J., dissenting).

32. U.S. CONST. art. I, § 2, cl. 3.

33. *See Dred Scott v. Sandford*, 60 U.S. 393 (1856), *superseded by constitutional amendment*, U.S. Const. amend XIV.

34. PAUL HEINEGG, *FREE AFRICAN AMERICANS OF MARYLAND AND DELAWARE FROM THE COLONIAL PERIOD TO 1810*, at 1 (2000). On a personal note, these descendants of Native American unions congregated in an area of Prince George’s County, Maryland named Piscataway (an area abutting Brandywine, Maryland) during the 1700s-1800s. *See app. C* (providing the 1878 map). The author’s ancestors lived in Piscataway as well as the Brandywine area.

35. HEINEGG, *supra* note 34, at 1.

36. *Id.*

37. *Id.*

38. *Id.*

“Colonial White Mater Privilege”

There had been a number of marriages between white women and slaves [or free black men (including Elizabeth Shorter and “Little Robin”)] by 1664 when Maryland passed a law which made them and their mixed-race children slaves for life, noting that ‘*divers freeborne English women forgettfull of their free Condison and to the disgrace of our Nation doe intermarry with Negro Slaves.*’<sup>39</sup>

Pursuant to this 1664 statute, free White women in miscegenistic marriages would be enslaved for the life of their husbands—a cruel form of a life estate *pur autre vie*.<sup>40</sup> Meanwhile, the mulatto children of these marriages would serve under the same conditions and/or controls as their fathers.<sup>41</sup> However, mulatto children who were already alive/born at the time the 1664 statute was passed, would serve until they were thirty years of age—presumably a lesser penalty than for their father’s term.<sup>42</sup>

In 1681, Maryland amended the strict 1664 statute by releasing White servant women and their mixed-race children from slavery if the marriage was permitted or encouraged by their master.<sup>43</sup> During this time-frame, as chronicled by Paul Heinegg, 156 families in Delaware and Maryland alone descended from inter-racial marriages—this included both the Shorter and the Hawkins families located in the City of Tee Bee (the initials for “Thomas Brooks”), in Prince George’s County, Maryland.<sup>44</sup> Based upon the historical and genealogical records, these inter-racial marriages by White women to Black and mulatto males were long-term relationships—bearing numerous free White, mulatto, and lesser Black-blood-quantum children.<sup>45</sup>

In addition to the 156 Maryland and Delaware families uncovered by Heinegg, he lists 93 additional White women bearing 107 children with Black men in Maryland alone.<sup>46</sup> In 1692, Maryland waffled again by enacting a law which punished White women who had children by slaves by selling them as servants for seven years and binding their children to serve until the age of twenty-one if they were married

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39. *Id.* (quoting The 1664 Act).

40. *See id.*

41. *See id.*

42. *Id.*

43. *See* An Act Concerning Negroes and Slaves, 7 MD. ARCHIVES 203, 204 (1681) (repealed The 1664 Act).

44. *See* HEINEGG, *supra* note 34, at 2, 7-8; HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, *supra* note 15, at 201-03.

45. *See* HEINEGG, *supra* note 34, at 2, 7-8; KENNEDY, *supra* note 15, at 68-69.

46. *See* HEINEGG, *supra* note 34, at 8-12; KENNEDY *supra* note 15, at 70-72.

to the slave, and until thirty-one if they were not married.<sup>47</sup> The Black husbands were enslaved for life. Ministers who performed these marriages were subject to fine.<sup>48</sup>

In 1715 and 1728, the Maryland General Assembly made the mixed-race descendants of White women who had children by slaves subject to the same punishments as the White women.<sup>49</sup> The White women were sold as servants for seven year terms, and their children were bound until the age of thirty-one.<sup>50</sup>

However, [in 1715], if [the white mother] had a child by a free person, [the women] were usually charged with fornication, [a lesser offense,] and received the same sentence as if both partners had been white: a fine or lashes, and their children were bound until the age of twenty-one (for boys) and sixteen (for girls).<sup>51</sup> It is reported that at least 256 White women were prosecuted in Maryland for fornication during the Colonial period.<sup>52</sup>

In most areas of Maryland, free Blacks had little opportunity to own land; however, the opportunity for landownership by freed Negroes was greater in Virginia than in Maryland.<sup>53</sup> However, as will be discussed below, Black persons who brought petitions for freedom and land reclamation suits claiming “Colonial White Mater Privilege” prevailed.<sup>54</sup> This prohibition of land ownership for free Blacks was yet another tangible reason for White mothers to assert the ultimate White privilege for their children—to have these mixed-race children be deemed legally White.

“Free [Black] families in Maryland appear to have had closer relations with the slave population than did their counterparts in other colonies or states, particularly North Carolina and Delaware.”<sup>55</sup> That may be due to the fact that many early nineteenth-century certificates of freedom describe Maryland descendants as being dark-skinned.<sup>56</sup>

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47. See An Act Concerning Negro Slaves, 13 MD. ARCHIVES 546-48 (1692).

48. See *id.* at 549.

49. See An Act Relating to Servants and Slaves, 30 MD. ARCHIVES 283-92 (1715); Supplementary Act to Servant and Slave Act, 36 MD. ARCHIVES 275-76 (1728).

50. See 30 MD. ARCHIVES at 289-90.

51. HEINEGG, *supra* note 34, at 2 (citation omitted).

52. See *id.*

53. See *id.* at 3-4; HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, *supra* note 15, at 204; Moran, *supra* note 15, at 22-25.

54. See *infra* Part V.

55. HEINEGG, *supra* note 34, at 4; see also IRA BERLIN, GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES 104-06 (2003); HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, *supra* note 15, at 204-05; KENNEDY, *supra* note 15, at 66.

56. See HEINEGG, *supra* note 34, at 4.

In addition, some free families had relatives who were slaves or owned slaves themselves.<sup>57</sup> The author discovered this confounding occurrence within her own ancestry.<sup>58</sup>

Perhaps the principal determinant of meaningful interaction between slaves and White communities was land ownership; many free Black families had at least one member of the family who owned land.<sup>59</sup> As expected, land ownership led to closer relations between free Blacks and Whites, and less social interaction with slaves.<sup>60</sup>

#### IV. THE TAYLES OF THE WHYTE MATRIARCHS

*Some people are your relatives but others are your ancestors, and you choose the ones you want to have as ancestors. You create yourself out of those values.*

—Ralph Ellison<sup>61</sup>

##### A. The Shorter Family

My earliest known direct ancestors were a married interracial couple. They were Elizabeth Shorter, a free White woman purportedly from England and “Little Robin” (origins unknown).<sup>62</sup> Although I have very recently discovered information that tentatively indicates that Elizabeth Shorter was born and baptized in London, England, there was no definite trace of Elizabeth until she was married to “Little Robin” in Saint Mary’s County, Province of Maryland in 1681 by a priest named Nicholas Geulick. Although it is unclear how they came into his household, later, William Roswell gave the couple to Anthony

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57. See generally BERLIN, *supra* note 55 (tracing the history of African American slavery in the United States); PAUL FINKELMAN, *SLAVERY, RACE, AND THE AMERICAN LEGAL SYSTEM (1700-1872)*, STATUTES ON SLAVERY: THE PAMPHLET LITERATURE, SERIES VII, VOL. 1-2 (1988); GENOVESE, *supra* note 15 (arguing that the slaves laid the foundations for a separate black national culture); HIGGINBOTHAM, JR., *IN THE MATTER OF COLOR*, *supra* note 15, at 204 (analysis of racial progress and regress over the past three centuries); KENNEDY, *supra* note 15, at 42; QUARLES, *supra* note 16 (surveying African Americans’ past in the United States); SEX, LOVE, RACE: CROSSING BOUNDARIES IN NORTH AMERICAN HISTORY, *supra* note 12 (discussing race and sex in American history).

58. See *infra* App. C, 1820 Census; Washington, D.C. (showing Letty Shorter, a “free colored female” owned a female slave).

59. HEINEGG, *supra* note 34, at 5.

60. See *id.*

61. *Novelists: Ovid in Ossining*, TIME, Mar. 27, 1964, available at <http://www.time.com/time/printout/0,8816,938562,00.html>.

62. The author recently discovered that Elizabeth Shorter was purportedly born in London, England in 1662. This document is on file with the author.

Neale of Charles County, Province of Maryland.<sup>63</sup> Elizabeth and Robin had three mulatto children: Mary, Jane, and Martha.<sup>64</sup> An obvious irony is the court's later reference to her by name and to him by his moniker.<sup>65</sup> Thus, the origination of the family name "Shorter" descended to me through my paternal grandmother.<sup>66</sup>

In 1682, Elizabeth Shorter, a glover by trade, received a land grant from William Penn in the then-Province of Pennsylvania.<sup>67</sup> Notably, at the same time, William Boswell (also known as Roswell), a poulterer, also received a land grant. Boswell would later claim Elizabeth and Robin as indentured servants.<sup>68</sup> It is unclear how or when these lands, purportedly located in the Province of Pennsylvania, were either traded or sold for land in Tee Bee, Prince George's County, Province of Maryland.

At the time of Elizabeth and Robin's marriage in 1681, Maryland State law, although undoubtedly contrary to its intent, stated that, any White woman who married a slave man would be freed from any indentured service and her children would ultimately be free as well.<sup>69</sup>

Although masters who allowed such marriages and ministers who performed them were subject to fines of 10,000 pounds of tobacco, indentured White servants were encouraged to marry Black slaves and gain their freedom.<sup>70</sup> Thus, Elizabeth and Robin's union and status as freed, enslaved, or indentured servant were the subject of a case (brought centuries later by their descendants through the maternal line) that made its way to Maryland's highest state court in 1808—one of the few such cases to do so.<sup>71</sup>

## B. The Hawkins Family

The Hawkins family has a similar story to the Shorters, although the author has only been able to trace her roots back for six genera-

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63. See HEINEGG, *supra* note 34, at 325. The actual documents for this marriage were destroyed in a fire at the Church in Saint Mary's County, Maryland where such documents were traditionally held and recorded. See ROBERT W. BARNES, MARYLAND MARRIAGE EVIDENCES, 1634-1718, at 1 (2005).

64. Shorter v. Boswell, 2 H. & J. 360 (Md. 1808).

65. *Id.*

66. See generally *infra* App. C (showing a schematic of the author's straight-line descendency for twelve generations from Elizabeth Shorter and Little Robin).

67. Hannah Benner Roach, *The First Purchasers of Pennsylvania*, in PASSENGERS AND SHIPS PRIOR TO 1684, at 197-98 (Walter Lee Sheppard Jr. ed., Heritage Books 1992).

68. *Id.* at 198; Shorter v. Boswell, 2 H. & J. 360 (Md. 1808).

69. An Act Concerning Negroes and Other Slaves, 1 MD. ARCHIVES 533-34 (1664).

70. *Id.*

71. Shorter v. Boswell, 2 H. & J. 360, 359 (Md. 1808).



tions to the 1880 census.<sup>72</sup> In the 1880 federal census, the author found Eveline Hawkins (then ninety-three years old, living with her grand and great-grand children), the author’s mulatto or White (depending upon which document or oral history you review) great-great-great grandmother.<sup>73</sup> Her mulatto grandson Clarence, married Harriett Booze, purportedly a White woman from Virginia.<sup>74</sup>

According to family oral history and lore, Clarence eventually owned nearly 1000 acres of fine tobacco land in Prince George’s County—near Tee Bee, Maryland. The same land is where, nearly a hundred years later, half of all of those family reunions were held—at the Union Bethel AME Church (pastured and attended by generations of Hawkins—even today)—which is located right down the road from the Shorter Family’s expansive acreage—and the Grace Methodist Church.<sup>75</sup>

#### V. PETITIONS FOR FREEDOM & LAND RECLAMATION CASES: TESTING THE THEORY IN MARYLAND

This section, *seriatim*, expressly examines the author’s theory of “Colonial White Mater Privilege” by applying the theory to the facts and circumstances of relevant cases from Colonial Maryland. Between 1642 and 1873, there were 479 cases recorded and decided in the Courts of the Province, and (later) the State of Maryland, involving slavery and Negroes.<sup>76</sup> Of these recorded cases, seventeen involved petitioners whose facts appear to include descendance from a free White woman.<sup>77</sup> In this Part, the author will discuss the facts of each of the seventeen relevant cases, provide the holdings in the trial and appellate courts for each case, and lastly apply the theory of “Colonial White Mater Privilege” to each case.

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72. *See infra* App. C.

73. *Id.*

74. *See infra* App. B & C (including a photograph of Clarence Hawkins that has been passed down for generations and was always displayed at the family reunions—on his grave site in the family’s plot at the “Hawkins Church”).

75. The author was at least the fifth generation of the Shorter family to be baptized there. These documents are on file with the author.

76. *See generally* JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 151 (Helen Tunnichiff Catterall ed., 1936) (providing a short synopsis of the cases concerning slavery during this period).

77. The author has reviewed each of these 479 cases spanning 231 years to determine the potential applicability of a petitioner’s claim of Colonial White Mater Privilege. As stated above, seventeen of the 479 cases appear relevant based upon the facts as recited. It should be noted that the majority of the cases brought by slaves (or their descendants) petitioning for freedom and/or land reclamation involved masters who had freed their slaves via will.

MARYLAND CASES<sup>78</sup>

A. *William & Mary Butler v. Boarman*<sup>79</sup>

This case primarily involved the status of the petitioners' mother—Eleanor Butler, also known as Irish Nell.<sup>80</sup> Irish Nell was alleged to have been a free White woman (who was brought into the Province of Maryland by Lord Baltimore as a domestic servant and not a slave).<sup>81</sup> In 1681, a few months before the then-Province of Maryland's legislature passed An Act Concerning Negroes & Slaves ("1681 Act"), Irish Nell married a Negro slave.<sup>82</sup> Previously, the Servant and Slave Act of 1664 had designated children who were born to free White women and husbands who were Negro slaves as slaves—in the same manner that the children's fathers were.<sup>83</sup> The 1681 Act, which repealed the 1664 Act, made those White women and their mulatto children (who were fathered by Negro slaves) free.<sup>84</sup>

Eleanor's children, William and Mary, the petitioners, were born after the 1681 Servant and Slave Act had been passed.<sup>85</sup> The petitioners argued that in light of their births after the enactment of the 1681 Act, the court should apply the 1681 Act (rather than the 1664 Act) and determine that they are free.<sup>86</sup>

The trial court found that the children were free and, thus, discharged them from service to the defendant.<sup>87</sup> The defendant appealed.<sup>88</sup> The appellate court reversed and found that the children were slaves.<sup>89</sup>

On appeal, the defendant argued to the court that "[l]aws ought to have commencement *in futuro*, and ought not to have an *ex post facto* exposition given to them."<sup>90</sup> Further, the defendant argued that

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78. It should be noted that some of the colonial Maryland trial-level opinions may contain an otherwise unpublished holding from the appellate court. When this occurs, the author shall include the appellate decision at the end of the discussion of the published trial court opinion.

79. *Butler v. Boarman*, 1 H. & McH. 371 (Md. 1770), *rev'd* (1771).

80. *Id.*

81. *Id.*

82. *See id.* at 372; An Act Concerning Negroes and Slaves, 7 MD. ARCHIVES 203 (1681).

83. An Act Concerning Negroes & Other Slaves, 1 MD. ARCHIVES 533, 533 (1664).

84. An Act Concerning Negroes & Slaves, 7 MD. ARCHIVES 204-05 (1681).

85. *See Butler*, 1 H. & McH. at 372.

86. *Id.*

87. *Id.* at 374.

88. *Id.*

89. *See id.* at 374, 376.

90. *Id.* at 375.

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“[s]tatutes shall not have a retrospective operation.”<sup>91</sup> Contrarily, petitioners argued that Lord Baltimore sought to have the 1664 Act repealed expressly in light of the marriage of Irish Nell, his servant.<sup>92</sup> Further, in general, Lord Baltimore wanted to change the law so that persons would be dissuaded or prevented from marrying free White woman to slaves with the intent of making those White women slaves.<sup>93</sup>

The court found that the marriage and not the children’s birth was the determining fact for application of the 1681 Act.<sup>94</sup> Thus, the children born after the 1664 Act was repealed remain slaves.<sup>95</sup> The appellate court reasoned that the 1664 Act made the children of free White women, intermarrying with a slave, slaves. Although the 1664 Act was repealed and the children were born after it was replaced by the 1681 Act, which determined that such children would be free, the court found that the marriage took place before the 1664 Act was repealed.<sup>96</sup> The appellate court took great pains to make certain that any interests or rights of the slave owners in any issue or children from these miscegenistic marriages were not disturbed by the 1681 Act in the name of preventing an *ex post facto* law.<sup>97</sup>

This is the first of the Maryland cases to which the theory of “Colonial White Mater Privilege” could be applied. However, the petitioners in this case *failed* to assert that privilege. Instead, the petitioners asserted that since they were born *after* the 1681 Act, the 1681 Act rather than the 1664 Act should apply to them, and thereby be held free by the appellate court as was held by the trial court below.<sup>98</sup>

Based upon the analysis, as referenced in the appropriate body of cases discussed below in Part V, it is the author’s contention that had the petitioners petitioned for freedom under a claim of “Colonial White Mater Privilege” and established their clear descendancy in the maternal line from a free White woman, they would have prevailed.

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 381.

95. *Id.*

96. *Id.*

97. *Id.* at 377-82.

98. *Id.*

B. *Toogood v. Scott*<sup>99</sup>

Eleanor Toogood petitioned for her freedom as being descended from a free White woman.<sup>100</sup> Eleanor's mother was Ann Fisher, a mulatto, who had sued for her freedom and lost.<sup>101</sup> Ann Fisher's mother (Mary Fisher)<sup>102</sup> and grandmother were White.<sup>103</sup> Eleanor Toogood's great-grandmother was purported to have had a child (assumed to be Mary, petitioner's grandmother) by an "East-India Indian."<sup>104</sup> Mary, a mulatto, became free after time in service living in Saint Mary's County, Maryland.<sup>105</sup>

The defendant argued that the judgment against petitioner's mother, Ann Fisher, was conclusive as to Eleanor's later claim.<sup>106</sup> The trial court rejected that argument and gave judgment for Eleanor.<sup>107</sup> The defendant appealed and the appellate court affirmed.<sup>108</sup>

The trial court opined and the appellate court affirmed that the former holding that petitioner's mother (Mary), a free mulatto woman, was a slave under the 1664 Act Concerning Negroes & Other Slaves<sup>109</sup> was not conclusive evidence that her children would be slaves.<sup>110</sup> The 1664 Act did not extend to petitioner's grandmother because she was a free mulatto woman and although she married a slave (Dick), she was free during his life.<sup>111</sup>

This case provides the optimum facts for the application of the "Colonial White Mater Privilege." The petitioner utilized the privilege and won her freedom on that basis, despite the fact that her mother's earlier petition for freedom failed. This case is an example of what the author calls "skip-generation" application of the privilege.

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99. *Toogood v. Scott*, 2 H. & McH. 26 (Md. 1782), *aff'd* (1783).

100. *Id.*

101. *Id.* at 26-27.

102. *Id.* at 26, 31.

103. *Id.* at 26.

104. *Id.*

105. *Id.*

106. *Id.* at 26-27.

107. *Id.* at 27.

108. *Id.* at 27, 37.

109. An Act Concerning Negroes and Other Slaves, 1 MD. ARCHIVES 533 (1664).

110. *Toogood*, 2 H. & McH. at 28.

111. *Id.* at 38.

C. *Butler v. Craig*<sup>112</sup>

Mary Butler, daughter of William and Mary Butler,<sup>113</sup> petitioned for her freedom as descended from a free White woman named “Irish Nell” (the petitioner’s grandmother)—a servant of Lord Baltimore who had married a Negro slave.<sup>114</sup> The defendant argued that since the petitioner’s parents had been found to be slaves in a prior case,<sup>115</sup> petitioner should be found the same.<sup>116</sup>

The trial court held that a judgment against the mother that she is a slave under the 1664 Act,<sup>117</sup> which turned free White women who married slaves into slaves themselves, was not conclusive evidence against their issue.<sup>118</sup> Further, the court found that, without a conviction for the crime of marrying a Negro slave, Irish Nell could not have become a slave (since she was a free White woman).<sup>119</sup> Any court records of that criminal proceeding (if there ever were any) had been destroyed, and evidence of the conviction would need to be established via hearsay.<sup>120</sup> However, merely the length of time that Irish Nell and her descendants were held in slavery is not sufficient to satisfy the court of any previous conviction.<sup>121</sup>

The trial court held that the judgment against the mother is not conclusive against the children, and the record does not prevent the petitioner from having her freedom.<sup>122</sup> The defendant appealed.<sup>123</sup> In an otherwise unpublished opinion, noted at the end of the trial court’s opinion, following detailed arguments by the appellant and appellee, after considering the impact of the 1681 Act, which was intended to repeal the 1664 Act,<sup>124</sup> the Appellate Court affirmed.<sup>125</sup>

The petitioner pleaded the author’s theory of “Colonial White Mater Privilege” and the court applied it. Thus, the privilege gained a daughter—whose mother’s earlier petition failed (when she failed to

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112. *Butler v. Craig*, 2 H. & McH. 214 (Md. 1787), *aff’d* (1791).

113. *See id.* at 214-15.

114. *Id.* at 215; *Butler v. Boarman*, 1 H. & McH. 371 (1770).

115. *See generally Butler*, 1 H. & McH. at 371 (finding Mary Butler’s parents to be slaves).

116. *Craig*, 2 H. & McH. at 215-16.

117. An Act Concerning Negroes & Other Slaves, 1 MD. ARCHIVES 533 (1664).

118. *Craig*, 2 H. & McH. at 215-16.

119. *Id.* at 215.

120. *Id.* at 216.

121. *See id.*

122. *Id.*

123. *Id.*

124. *See Act Concerning Negroes and Slaves*, 7 MD. ARCHIVES 203-205 (1681); *Craig*, 2 H. & McH. at 217-236.

125. *See Craig*, 2 H. & McH. at 236.

plead “Colonial White Mater Privilege”)—her freedom. This case is an example of what the author calls a “skip-generation” application of the privilege.

D. *Rawlings v. Boston*<sup>126</sup>

Anthony Boston petitioned for his freedom as being descended from a yellow Portuguese woman named Catharine Boston.<sup>127</sup> Anthony’s grandmother (Linah, of yellow complexion with long black hair) was born to a Spanish woman (Maria or Marea), a descendant of Catharine Boston, before Maria/Marea moved to Maryland.<sup>128</sup> The court found that Marea/Maria was not a slave—but was a free woman.<sup>129</sup> As a direct matrilineal descendant of a free White woman, without discussion, Anthony Boston was held to be free.<sup>130</sup>

In this case, a descendant of a “Yellow-Colored” Spaniard successfully utilizes the “Colonial White Mater Privilege” to obtain his freedom. This case illustrates the broad interpretation of “White” for purposes of this privilege.

E. *Shorter v. Rozier*<sup>131</sup>

Basil Shorter petitioned for his freedom as lineally descended through the maternal line from a free White woman, Elizabeth Shorter.<sup>132</sup> Elizabeth Shorter married a Negro man, “Little Robin,” in about 1681.<sup>133</sup> Basil was descended from Mary (born 1683) who was Elizabeth and Robin’s first child.<sup>134</sup> Basil claimed that his mother was a mulatto named Linda, who was the daughter of Mary/Moll, also a mulatto.<sup>135</sup>

Since the church and the county clerk’s records had long been lost, the court relied upon affidavits and certifications from White persons regarding Elizabeth Shorter’s status as a free White woman, in-

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126. *Rawlings v. Boston*, 3 H. & McH. 139 (Md. 1793).

127. *See id.*

128. *Id.*

129. *Id.*

130. *See id.* at 139-140.

131. *Shorter v. Rozier*, 3 H. & McH. 238 (Md. 1794). It should be noted that this is the first of several cases involving the author’s ancestors—the Shorters. *See generally infra* App. C (providing the author’s straight lineal descendancy from Elizabeth Shorter and “Little Robin” the petitioner’s original ancestors in this case) and App. B (providing background information relating to the author’s ancestors).

132. *See Rozier*, 3 H. & McH. at 238.

133. *Id.* at 238-39.

134. *Id.* at 238.

135. *Id.*

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cluding the priest who married Elizabeth and Robin, Nicholas Geulick.<sup>136</sup> According to Mr. Geulick’s sworn affidavit dated June 15, 1702, both “Little Robin” (a Negro man) and Elizabeth Shorter (a White woman) were (indentured) servants (as opposed to slaves) to William Roswell.<sup>137</sup> Another sworn affidavit dated June 15, 1702, was presented as evidence from Emma Roswell (widow of William Roswell) who was present at the wedding of Elizabeth Shorter and “Little Robin.”<sup>138</sup> Mrs. Roswell claimed that Elizabeth Shorter and “Little Robin” were her former husband’s servants (rather than slaves).<sup>139</sup> Further, she attested that the couple had three mulatto daughters—namely, Mary, Jane and Martha (all living).<sup>140</sup>

In addition, a true copy of a land records book entry in Charles County from 1703 was also accepted into evidence presumably as proof of Basil Shorter’s land claim (the Official Records of the County Clerk’s Office from before 1744 in Saint Mary’s County had been lost or destroyed).<sup>141</sup>

As stated above, the General Court of Maryland held that the 1703 written statement of the priest attesting to the marriage he performed in 1681 between Elizabeth Shorter (a White woman) and “Little Robin” (a Negro man) and the 1703 written statement of a witness to the marriage who was the former “employer” of the couple was sufficient evidence of the union.<sup>142</sup> Thus, the petitioner (their descendant) was entitled to his freedom. The assertion and proof (through certified affidavits) of “Colonial White Mater Privilege” won Basil Shorter his freedom and land reclamation. Further, the court cited no statutory language or case law to support the issuance of this opinion.

F. *Thomas v. Pile*<sup>143</sup>

Robert Thomas petitioned for his freedom as descended in the maternal line from a free White woman, Elizabeth Thomas.<sup>144</sup> At the trial, oral testimony was taken from a free White woman, Mrs. Smith, who confirmed petitioner’s assertions of descendency (despite the de-

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136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 238, 240.

141. *Id.*

142. *Id.*

143. *Thomas v. Pile*, 3 H. & McH. 241 (Md. 1794).

144. *Id.*

fendant's attempts to undermine the witness' character).<sup>145</sup> The court held that the petitioner was entitled to his freedom.<sup>146</sup>

This case illustrates that a petitioner who asserts "Colonial White Mater Privilege" will indeed prevail—the court cited no statutory language or case law to support the issuance of this opinion.

G. *Higgins v. Allen*<sup>147</sup>

In or around 1794, Nathaniel Allen filed a petition for his freedom in the Anne Arundel County Court.<sup>148</sup> In his petition for freedom, Nathaniel Allen claimed to be descended from a free White woman.<sup>149</sup> His great-grandmother was a Scottish White woman, Hannah Allen, who had a child with a Negro.<sup>150</sup> That mulatto child was also named Hannah Allen and was Nathaniel's grandmother.<sup>151</sup> Hannah Allen (the second: Nathaniel's grandmother) also had a child with a Negro.<sup>152</sup> This child was named Jane Allen.<sup>153</sup> Jane Allen was Nathaniel's mother.<sup>154</sup> Jane had the petitioner with a Negro—in or around 1771.<sup>155</sup> In accordance with the 1715 Servant and Slave Act and the 1728 supplement ("1715 Act" and "1728 Act" respectively),<sup>156</sup> Jane was sentenced to serve seven years, for having a so-called "mulatto bastard" child by a Negro in 1772.<sup>157</sup> In addition, pursuant to the 1728 Act, Nathaniel who was just five months old at the time was sold to serve until he turned thirty-one years of age.<sup>158</sup>

In 1794, at about twenty-two years of age, Nathaniel Allen petitioned for his freedom.<sup>159</sup> The county court granted his petition for

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145. *Id.*

146. *Id.*

147. *Higgins v. Allen*, 3 H. & McH. 504 (Md. 1796), *aff'd* (1798).

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. See Supplementary Act to Servant and Slave Act, 30 MD. ARCHIVES 275-276 (1728). This Act subjected free mulatto women who have children with Negro men to the same penalties as white women under the 1715 Act. The 1715 Act subjected White women who had mulatto children to seven years of servitude and their offspring to serve until they reached the age of thirty-one years. See generally An Act Relating to Servants and Slaves, 30 MD. ARCHIVES 283-292 (1715) (outlining the penalties for white women who bore mulatto children).

157. See *Higgins*, 3 H. & McH. at 504.

158. See Supplementary Act to Servant and Slave Act, 30 MD. ARCHIVES 275-276 (1728); *Higgins*, 3 H. & McH. at 504.

159. See *Higgins*, 3 H. & McH. at 504.



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freedom.<sup>160</sup> The general court reversed the county court and remanded Nathaniel to servitude.<sup>161</sup> The court of appeals affirmed and Nathaniel was remanded to servitude until thirty-one years of age.<sup>162</sup>

Contrary to petitioner’s assertions of descending from the maternal line of a free White women or even the son of a mulatto woman,<sup>163</sup> the court found that petitioner was the child of a free mulatto mother (rather than a White mother) and a Negro father.<sup>164</sup> Under the 1715 Servant and Slave Act and the 1728 supplement, he was bound to serve until he reached thirty-one years of age.<sup>165</sup>

As stated above, free mulatto women having children by Negroes and their children are subject to the same penalties as White women and their children.<sup>166</sup> As such, Nathaniel’s mother was sentenced to serve seven years, and Nathaniel was bound to serve until he reached thirty-one years of age.<sup>167</sup> The reason for the failure of his petition is that the Maryland Acts that he was petitioning under (1715 Slave Act and 1728 Supplement) disallow application of the privilege to the descendants of free mulattos. In this case, there was no “Colonial White Mater Privilege” to assert. The petitioner was too closely descended from women whose genealogical backgrounds were more Black than White or even mulatto. Being a mixed-race, predominantly Black person does not “qualify” one as White, unless the Jefferson test for Whiteness has been met—namely, seven-eighth White to Black genealogical ratio.<sup>168</sup>

H. *Mahoney v. Ashton*<sup>169</sup>

Petitioner claimed his freedom based upon his descendancy from a free woman.<sup>170</sup> A slave, Ann Joice, was taken by her then-master

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160. *Id.* at 504, 510.

161. *Id.*

162. *Id.*

163. A mulatto is defined as a child who has one black/Negro parent and one white parent. *Id.* at 509. From the facts, Nathaniel’s mother’s heritage is more predominantly black than the 50/50% definition of a mulatto (since her grandmother was mulatto, but three generations of black males had intermingled to create the resultant child). *See id.* at 504.

164. *Id.* at 507-510.

165. *See* An Act Relating to Servants and Slaves, 30 MD. ARCHIVES 283, 290 (1715), available at <http://www.msa.md.gov/megafile/msa/speccol/sc2900/sc2908/000001/000030/html/am30-283.html>; Supplementary Act to Servant and Slave Act, 30 MD. ARCHIVES 275-276 (1728), available at <http://aomol.net/000001/000075/pdf/am75-371.pdf>.

166. *Id.*

167. *See Higgins*, 3 H. & McH. at 504.

168. *See* Letter to Francis C. Gray, Esq., *supra* note 20.

169. *Mahoney v. Ashton*, 4 H. & McH. 295 (Md. 1799).

170. *Id.*

from Barbados to England, where she remained from 1678 until 1681.<sup>171</sup> While in England, “ownership” of Ann Joice was transferred to Lord Baltimore.<sup>172</sup> She was then brought to the then-Province of Maryland.<sup>173</sup> Ann Joice was claimed as a slave from at least 1678 until 1681 and served as a slave her entire life.<sup>174</sup> Her offspring were also held as slaves for the duration of their lives.<sup>175</sup> The petitioner stressed the difference between the United States’ concept of slavery as opposed to the English concept of villenage (indenture).<sup>176</sup> Further, petitioner argued that, even if Ann Joice was a slave before, when she landed on the shores of England, that landing served to emancipate her (due to the contemporaneous anti-slavery laws and policies in England).<sup>177</sup>

The petition stated that since neither England, nor its common law, recognized slavery at the time Ann Joice left England with Lord Baltimore, she became a free woman between 1678 and 1688 while she resided in England.<sup>178</sup> Therefore, she came to the United States as a free woman—and, as such, could not lawfully be (re)enslaved.<sup>179</sup>

The trial court held for the petitioner, the defendant appealed to the court of appeals.<sup>180</sup> The appellate court held that the case was governed by the laws of Maryland, namely, the 1664 and 1715 Acts—not the laws of England/Great Britain.<sup>181</sup> Therefore, the court of appeals concluded that when Ann Joice was brought into the then-Province of Maryland, she was brought as a slave and remained one for her life.<sup>182</sup> Thus, the court reversed the lower court’s decision.<sup>183</sup>

In this case, the petitioner could not claim to be a matrilineal descendant of a free White woman. His petition was based solely on the status of a slave who might have gained her freedom through operation of law in England—where she resided for several years with her

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171. *See id.* at 305.

172. *See id.* at 297.

173. *Id.* at 303.

174. *See id.* at 323.

175. *Id.*

176. *See id.* at 297-301.

177. *Id.* at 299.

178. *See id.* at 301-302.

179. *See id.*

180. *Id.* at 306.

181. *Id.* at 295, 321-22, 325. *See generally* An Act Concerning Negroes and Slaves, 1 MD. ARCHIVES 533 (1664) (outlining an act making race-mingling among Negroes, slaves, and free white people illegal); An Act Relating to Servants and Slaves, 30 MD. ARCHIVES 283 (1715) (act providing penalties for race-mingling).

182. *Mahoney*, 4 H. & McH. at 325.

183. *Id.*

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then-Master, Lord Baltimore.<sup>184</sup> Based upon these facts, the author’s theory of “Colonial White Mater Privilege” would not apply. As a result, the petitioner’s claim failed (as was the result in the court of appeals).<sup>185</sup>

I. *Shorter v. Boswell*<sup>186</sup>

Nelly Shorter (born 1772) (cousin of Basil Shorter, the petitioner in *Shorter v. Rozier*) petitioned for freedom because she descended from a free White woman, Elizabeth Shorter.<sup>187</sup> The petitioner used hearsay evidence to establish she was a descendant of the married couple Elizabeth Shorter (a free White woman) and “Little Robin” (a Negro man).<sup>188</sup> Nelly’s great-great-grandmother Martha/Pat (who was born in 1687) was the third child of Elizabeth and Robin.<sup>189</sup> The petitioner provided evidence at the trial that she directly descended from Patt/Martha Shorter.<sup>190</sup> Patt/Martha was in servitude to (but *not* a slave to) Thomas Lancaster.<sup>191</sup> As an indentured servant, Martha/Patt was still a free mulatto woman.<sup>192</sup>

The hearsay evidence consisted of the depositions of two witnesses who testified to petitioner’s lineage and familial circum-

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184. *Id.*

185. *Id.* at 297.

186. *Shorter v. Boswell*, 2 H. & J. 359 (Md. 1808). This is the second case that involves the author’s lineal ancestors. The petitioner in this case is the cousin of Basil Shorter, the petitioner in *Rozier*. *Shorter v. Rozier*, 3 H. & McH. 238, 238 (Md. 1794).

187. *See Boswell*, 2 H. & J. at 359. It should be noted that the case itself *never* provides the petitioner’s first name—it just refers to the petitioner from time-to-time as “she.” However, the author, through her extensive genealogical research of her own extended family, has determined that the Petitioner was Nelly Shorter (b. 1772). Nelly is the daughter of Betty and the great-great-granddaughter of Elizabeth Shorter. *See id.* at 360.

188. *See id.*

189. *See id.*

190. *Id.*

191. *Id.*

192. For the concept of slavery versus indentured servitude, see HIGGINBOTHAM, JR., IN THE MATTER OF COLOR, *supra* note 15, at 154-160; HIGGINBOTHAM, JR., SHADES OF FREEDOM, *supra* note 20, at 18-19; MORAN, *supra* note 15, at 18-19; QUARLES, *supra* note 16, at 43. *See generally From Indentured Servitude to Racial Slavery* AFRICANS IN AMERICA: THE TERRIBLE TRANSFORMATION, <http://www.pbs.org/wgbh/aia/part1/1narr3.html> (last visited Nov. 1, 2011) (giving a narrative on the development of slavery in colonial America); *Slavery and Indentured Servants*, AM. WOMEN: L. LIB. CONGRESS, available at <http://memory.loc.gov/ammem/awhhtml/awlaw3/slavery.html> (last visited Nov. 1, 2011) (providing background material on the history of slavery and indentured servants in America).

stances.<sup>193</sup> The lower court refused to allow parts of the depositions to be read to the jury.<sup>194</sup>

In addition to the witnesses' statements, petitioner offered a record book (folios 225 and 226), entered June 25, 1703,<sup>195</sup> of the Charles County Court containing the sworn affidavit of a priest, Nicholas Geulick, dated June 15, 1702, which stated that he had married a Negro man, "Little Robin," and a White woman, Elizabeth Shorter, in 1681 in Saint Mary's County, Maryland "according to the then law."<sup>196</sup> Reverend Geulick's affidavit also stated that they were, at that time, both servants (not slaves) to William Roswell and then "disposed of" to Anthony Neale.<sup>197</sup> Petitioner claimed that Elizabeth was free and that "Little Robin" was a servant (not a slave).<sup>198</sup>

The record book (folios 225 and 226) of the Charles County Court also contained the sworn affidavit of Emma Roswell (seventy-years-old), the widow of William Roswell.<sup>199</sup> The affidavit stated that Emma was present at the wedding performed by Reverend Geulick of Elizabeth Shorter, a White woman, and "Little Robin," a Negro man.<sup>200</sup> Emma further states that the two were servants (not slaves) to Emma's now-deceased husband, William Roswell.<sup>201</sup> She also attests that both were given to Anthony Neale when he married her daughter Elizabeth Roswell—and remained in Neale's service "ever since."<sup>202</sup> Finally, she attested to Elizabeth and Robin having three daughters—namely, Mary, Jane, and Martha.<sup>203</sup>

At the trial, petitioner provided evidence that the official documents from Saint Mary's County Clerk's Office and the Parish Regis-

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193. *Boswell*, 2 H. & J. at 359. Depositions from two separate witnesses were accepted by the Court of Appeals. *See id.* The statement from the deposition of Mary Lancaster taken on August 24, 1804 read, in part, as follows: "that she knew Patt [Shorter], and always understood she came from *Raphael Neale* but did not know it of her own knowledge, and heard that she went by the name of *Patt Shorter*." *Id.* at 359. The statement from the deposition of Thomas Lancaster read, in part, as follows: "[t]hat his mother [now deceased], in her life-time, told him that it was generally reported, and she always understood, that a woman named *Patt* or *Martha* [Shorter] came to the family of John Lancaster from the family of *Raphael Neale*, of Saint Mary's County [Maryland]." *Id.* at 359.

194. *Id.* at 360.

195. *Id.* at 360-61.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

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tries in King’s and Queen’s Parish of the County evidencing and/or recording the marriage of Elizabeth Shorter and Little Robin had been lost or destroyed—as was the case with many official documents prior to 1744.<sup>204</sup>

The defendant’s objection to the admissibility of the record book (folios 225 and 226), entered June 25, 1703,<sup>205</sup> of the Charles County Court was sustained by the trial court.<sup>206</sup> The trial court held against the petitioner (thus denying her petition for freedom) who appealed to the Maryland Court of Appeals.<sup>207</sup> The court of appeals overturned the trial court’s determination that portions of the witnesses’ depositions and the Charles County Court record book entries were inadmissible.<sup>208</sup> Without a discussion on the merits, the court of appeals reversed the trial court’s decision, and thereby awarded petitioner, Nelly Shorter, her freedom.<sup>209</sup>

Again, this case evidences the predominance of the claim of “Colonial White Mater Privilege” for petitions for freedom. Here, Nelly Shorter was able to prove her maternal lineal descendancy went back five generations to the appropriate married free White woman—Elizabeth Shorter.<sup>210</sup> The petitioner was defeated at the trial level solely due to the fact that the defendant was able to successfully question the admissibility of Petitioner’s evidence based upon its alleged hearsay content.<sup>211</sup> This was the same evidence that was successfully admitted in the case of *Shorter v. Rozier*<sup>212</sup> and was instrumental in gaining the petitioner, Basil Shorter (Nelly Shorter’s cousin) his freedom at the trial level.

J. *Sprigg v. Negro Mary*<sup>213</sup>

Petitioner filed a petition for freedom in Frederick County Court.<sup>214</sup> Negro Mary gave evidence at trial that she was born to Es-

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204. *Id.* at 360-62.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* Nelly Shorter’s resultant certificate of freedom (document on file with the Author) was noted in the 1810 census.

210. *Id.*

211. *Id.*

212. *Shorter v. Rozier*, 3 H. & McH. 238 (Md. 1794).

213. *Sprigg v. Negro Mary*, 3 H. & J. 491 (Md. 1814).

214. *Id.*

ther, a slave to T. Sprigg (who died in 1810).<sup>215</sup> Being a child of a slave, petitioner Mary was also held as a slave to T. Sprigg.<sup>216</sup>

In 1804, T. Sprigg “suffered” Esther “to be carried to Washington County, in the District of Columbia” by C. Herston.<sup>217</sup> Esther stayed in Washington County for two years working for and living with the Herstons.<sup>218</sup> While Esther was living and working in the District of Columbia, Mary was born.<sup>219</sup>

After two years in the District of Columbia with the Herstons, Esther and her daughter Mary (the petitioner) were sent back to T. Sprigg in Frederick County, Maryland.<sup>220</sup> Esther lived with and was employed by T. Sprigg until he died in 1810.<sup>221</sup> Based upon the above-facts, Negro Mary petitioned for her freedom based on being born in Washington County, in the District of Columbia.<sup>222</sup>

The court allowed testimony from R. Shorter (born 1745, a free mulatto whose mother was a free mulatto or Black woman descended from a free White woman, Elizabeth Shorter).<sup>223</sup> As discussed below, R. Shorter is actually Rachel Shorter, a free mulatto woman.<sup>224</sup> Rachel’s freedom and repute within the community was confirmed by the collateral testimony of a White male attorney of the court—R. Brooke.<sup>225</sup> Rachel was proven to have been sworn as a witness for Nelly Shorter (Rachel’s cousin) in an action against Jason Phillips—a free White Christian man.<sup>226</sup>

It was further contended and proven that Rachel Shorter had won her freedom from T. Sprigg on December 2, 1795.<sup>227</sup> Although the official court records of that proceeding have been lost, Rachel

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215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 491-92. Although the court refers to the witness as “R. Shorter” and as a he or him, in light of her extensive genealogical research, the author has determined that the witness is actually Rachel Shorter—*female*. Based on the author’s extensive family tree, Rachel, a free mulatto woman, is the only “R. Shorter” who could have testified in this case. Further, the *Sprigg v. Negro Mary* case mentions that R. Shorter testified on behalf of Nelly Shorter in another case (an action against Jason Phillips (unpublished)). *Id.* at 491. Nelly Shorter (Rachel’s cousin) was the petitioner in *Shorter v. Boswell*, 2 H. & J. 359 (Md. 1808) discussed in *supra* Part IV. Documents on file with Author.

224. *See supra* text accompanying note 209.

225. *See Negro Mary*, 3 H. & J. at 491.

226. *See id.*

227. *Id.*

produced: (1) a certificate from the Clerk of the Frederick County Court certifying his recovery of freedom, and (2) the docket entries of the court.<sup>228</sup>

The defendant objected to Rachel Shorter’s testimony, but the court overruled the objection and allowed Rachel to testify against a “free White Christian man”—the defendant T. Sprigg (a relative of Rachel’s former master).<sup>229</sup>

The trial court held that the petitioner was entitled to her freedom because she was born in Washington County in the District of Columbia while her mother was taken into and living in that county.<sup>230</sup> The decision was based solely on a 1796 Act that deemed a slave, who belongs to a child under sixteen and who was brought into Maryland by the father or natural guardian of the child, not entitled to his freedom.<sup>231</sup>

In the early 1800’s in Colonial Maryland, it was quite unusual (albeit not impossible) for a Negro—even a free Negro—to testify against a free White Christian. In general, Negroes were deemed incompetent to do so.<sup>232</sup> Thus, Rachel’s testimony *against* two white

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228. *Id.*

229. *Id.*

230. *Id.* at 491-492.

231. *Id.* at 492-93; *see also* An Act Relating to Negroes, 105 MD. ARCHIVES 249 (1796).

232. *See* Rusk v. Sowerwine, 3 H. & J. 97 (Md. 1810). This case involved testimony by Benjamin Banneker’s sister, Minta. Minta and Benjamin Banneker (then-deceased) (both born of the same parents) had always been reputed as free. Their mother too had been reputed as free and “descended of free parentage.” *Id.* at 97. This descendancy and notoriety in the community did not overcome the bias against free Negroes testifying against “free white Christian men”—the court even went so far as to call Mr. Banneker’s prior testimony against Whites into question. *See id.* Benjamin Banneker was born on November 9, 1731, and died October 25, 1806. Banneker’s maternal Grandmother (Molly Welsh), a free White woman, came to Maryland as an indentured servant (bonded for seven years). *See Benjamin Banneker Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/benjamin-banneker-9198038> (last visited Nov. 1, 2011); Nick Greene, *Benjamin Banneker Biography: First African American Astronomer*, ABOUT.COM, <http://space.about.com/od/astronomerbiographies/a/bannekerbio.htm> (last accessed Nov. 1, 2011). She purchased land in Maryland and two slaves. *See Benjamin Banneker Biography*, BIOGRAPHY.COM, *supra*. She later freed both and married one of them who was named BannaKa (or Bannka)—who later changed his name to Bannaky. *Id.* One of their children, Mary Bannaky, would later own a slave named Robert and then marry him. *Id.* Mary and Robert Bannaky owned a 100-acre tobacco farm near the Patapsco River in Maryland. *Id.* Mary and Robert were the parents of Benjamin Bannaker and three daughters. *Id.* Bannaker was the maternal lineal descendant of a free white woman—Mary Welsh. *Id.* Benjamin Bannaker was born a free Negro. *Id.* As a free person, he would learn to read and write; own land (he inherited the 100-acre farm from his father); make the first wooden clock in the United States (1761); study astronomy & advanced mathematics; write an annual Almanac (1791-1802); and he assisted in designing Washington, D.C. as the first African American Presidential appointee (appointed to the District of Columbia Commission by President George Washington in 1790). *See* Greene, *supra*; *Benjamin Banneker Biography*, BIOGRAPHY.COM, *supra*. Despite the extensive qualifications and good repute of Benjamin Banneker, his sister Minta was deemed by

Christian *men*, as documented in two separate cases, is nothing short of momentous and historic.

Due to Rachel Shorter's "Colonial White Mater Privilege" that resulted in her successful petition for freedom, Rachel was able to testify against a "free White Christian man" and gain Negro Mary her freedom. It is interesting to note once again that the case itself refers to Rachel Shorter as "R. Shorter" and implies that she was a male. This misinformation was obviously supplied to lessen the impact of a female mulatto's testimony contradicting a so-called "White Christian man."<sup>233</sup>

The theory of "Colonial White Mater Privilege" was not tendered by the petitioner. Based upon the facts provided in the case, it is inconclusive whether petitioner would have met that test by being a matrilineal descendant of a free white female—it is, however, possible since Mary's mother Esther was described as a mulatto. Nonetheless, Mary lost her petition for freedom in the court of appeals on other grounds.<sup>234</sup>

K. *Sprigg v. Negro Presly*<sup>235</sup>

This is a companion case to *Sprigg v. Negro Mary*.<sup>236</sup> Presly (a slave, born to a slave mother Esther) was three-years-old when he was taken along with his mother from Maryland to Washington County in the District of Columbia.<sup>237</sup> Esther was sent to Washington, D.C. with the consent of her Master, T. Sprigg, to care for and live with the Herstons.<sup>238</sup> Esther and her children, including Presly, lived in Washington, D.C. with the Herstons for two years.<sup>239</sup>

The defendant argued that Esther and her children, including Presly, were given, sold, or lent to the Herstons expressly for the use by or care of the Herstons' young daughter.<sup>240</sup> The trial court found for petitioner and awarded his petition for freedom.<sup>241</sup> The defendant

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the Baltimore County Court and the Court of Appeals of Maryland to be "an incompetent witness" against "free white defendants." *Rusk v. Sowerwine*, 3 H. & J. 97, 97 (Md. 1810).

233. *See Negro Mary*, 3 H. & J. at 491-92.

234. *Sowerwine*, 3 H. & J. at 99.

235. *Sprigg v. Negro Presly*, 3 H. & J. 493 (Md. 1814).

236. *See* Part V.K. (discussing the case in detail).

237. *See id.* at 493-494.

238. *See id.* at 493.

239. *See id.*

240. *See id.* at 494, 496.

241. *See id.* at 494.



“Colonial White Mater Privilege”

appealed to the court of appeals.<sup>242</sup> Without discussion, the court of appeals reversed the decision.<sup>243</sup>

As in the companion case of *Sprigg v. Negro Mary*, the theory of “Colonial White Mater Privilege” was not tendered by the petitioner, Presly (Mary’s older brother). Based upon the facts provided in the case, it is inconclusive whether petitioner would have met that test by being a matrilineal descendant of a free white female—it is, however, possible since Presly’s mother Esther was described as a mulatto. Nonetheless, Presly lost his petition for freedom in the court of appeals on other grounds.<sup>244</sup>

L. *Walkup v. Pratt*<sup>245</sup>

Petitioner claimed to be a matrilineal descendant from a free Indian woman named Violet.<sup>246</sup> He stated that he was the son of Tansey, who was the daughter of Violet.<sup>247</sup> There was testimony that petitioner’s grandmother Violet was the daughter of a Negro slave (named either Violet or Rose) who was purchased by the witness’s grandfather.<sup>248</sup>

Defendant’s evidence further showed that Violet (a mulatto slave) had been bequeathed via will dated January 5, 1733, to a then-unborn child (who was being carried by its mother at the time of the will)—Violet was to be delivered to the child when it came of age.<sup>249</sup> In 1735, a slave named Violet (age nine) was included in the inventory of the estate.<sup>250</sup> Forty years later, around 1775, an inventory of the estate of the recipient of the 1733 estate, listed a mulatto woman named Violet (then fifty-three years old), and a mulatto girl named Tansey (age nine).<sup>251</sup> The remaining contents of that estate (including the petitioner as a slave) were willed to the defendant in 1809.<sup>252</sup>

Testimony for the defendant showed that Violet, a mulatto, had stated that she was the daughter of a Black woman and a White

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242. *See id.* at 493, 496.

243. *See id.* at 496.

244. *Id.*

245. *Walkup v. Pratt*, 5 H. & J. 51 (Md. 1820).

246. *Id.*

247. *Id.*

248. *Id.* at 52.

249. *Id.* at 53.

250. *Id.*

251. *Id.* at 54.

252. *Id.*

man.<sup>253</sup> Petitioner lost his claim for freedom in the lower court.<sup>254</sup> Petitioner then appealed to the Court of Appeals of Maryland; the judgment was affirmed.<sup>255</sup>

Petitioner provided inadequate evidence to prove that Violet was free.<sup>256</sup> Under the “Colonial White Mater Privilege” analysis, being a mulatto without more is insufficient to gain freedom. In addition, Violet—though a mulatto—is a descendant of a Black woman and a White man, not descended from a free White woman. The author’s theory of “Colonial White Mater Privilege” does *not* apply to these facts—thus, petitioner lost his claim.

M. *Davis v. Calvert*<sup>257</sup>

Caroline Calvert (a mulatto born of a Negro slave mother and a White father—George Calvert) was Thomas Cramphin’s mistress.<sup>258</sup> They began their relationship when Cramphin was about seventy-five, and he died at age ninety-two.<sup>259</sup> Caroline and Thomas lived together with their subsequent children for nearly twenty years.<sup>260</sup> Cramphin executed a will in 1824, with codicils in 1824 and 1825.<sup>261</sup> In 1824, at the time of the will, he and Caroline had seven live children who were named in the will.<sup>262</sup> Around the time the will was written, Caroline belonged to George Calvert, who is reputed to be her father.<sup>263</sup>

Two days before the will was executed, George Calvert freed Caroline and executed bills of sale to her for her seven children with provisos that the males would be free at twenty-one-years-old, and the females free at eighteen.<sup>264</sup>

Caroline subsequently had three more children (born after she was emancipated and after Cramphin executed the disputed will).<sup>265</sup> The will named George Calvert as the executor.<sup>266</sup> The will left his entire estate to Caroline Calvert and the seven children who were

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253. *Id.* at 55.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Davis v. Calvert*, 5 G. & J. 269 (Md. 1833).

258. *Id.* at 273, 306.

259. *See id.*

260. *See id.*

261. *Id.* at 271, 306-07.

262. *Id.* at 273, 306.

263. *Id.*

264. *Id.* at 306.

265. *Id.*

266. *Id.* at 306.

“Colonial White Mater Privilege”

alive when Cramphin executed the will in 1824.<sup>267</sup> Cramphin died in December of 1830.<sup>268</sup> On January 25, 1831, Thomas Cramphin’s relative, Elizabeth Davis, challenged Cramphin’s will.<sup>269</sup> The defendants prevailed (namely, George Calvert as executor) and the court ruled to enforce the will.<sup>270</sup> Elizabeth Davis appealed.

The 1798 Act concerning wills provides that a testator making a will must be of sound mind at the time he makes the will; a will is invalid if the testator is not competent.<sup>271</sup> Evidence of the testator’s condition before and after the will was made may be admitted to establish his state of mind at the making of the will.<sup>272</sup> In order to void a will under the act, parties must show more than the imprudence of the will’s provisions.<sup>273</sup> However, contents of a will could be used to show incapacity.<sup>274</sup> Further, a will or testament obtained by fraud, undue influence or importunity is void.<sup>275</sup> Facts that are irrelevant to the pertinent issue were not admissible, but such facts tending to prove the issue were admissible.<sup>276</sup>

Here, the court of appeals found that Davis’ proposed evidence (found inadmissible at the trial level) seeking to establish Caroline’s bad character and the paternity of the children, should have been admitted.<sup>277</sup> The court implies that Cramphin was not of sound mind because he left everything to his former-slave mistress and their alleged seven children; but left nothing to his legal wife, children, and other relatives.<sup>278</sup> The court of appeals reversed finding that the will was invalid.<sup>279</sup>

The defendants/appellants lose in this case as well because “Colonial White Mater Privilege” does not apply since the petitioner is not the descendant of a White matriarch, but of a White patriarch.

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267. *See id.* at 273.

268. *Id.* at 306.

269. *Id.* at 271.

270. *Id.* at 281.

271. Act Regulating Testamentary and Wills, Administrators and Executors, 653 MD. ARCHIVES 64-82 chap. 101 (1798).

272. *Calvert*, 5 G. & J. at 282.

273. *Id.* at 269, 300.

274. *Id.* at 300-01.

275. *Id.* at 269, 285.

276. *Id.* at 304.

277. *Id.* at 308-09.

278. *Id.* at 300-01.

279. *Id.* at 313.

N. *Burke v. Negro Joe*<sup>280</sup>

Petitioner claims freedom as the issue/son of a free mother and grandmother.<sup>281</sup> In 1784, Negro Dinah (petitioner's grandmother) and Negro Lavy/Lavinda (petitioner's mother) were slaves.<sup>282</sup> In 1797, both Dinah and Lavy were living and acting as free women—including renting out properties, collecting rent, owning property, and supporting themselves by being paid for their labor.<sup>283</sup>

Dinah and Lavy lived within three miles of the residence of the now-alleged master/owner.<sup>284</sup> They continued in this manner until the death of their "Owner" (William Mackubin) in 1805.<sup>285</sup> At that time, their "Owner's" will devised all of his property to his wife, Elizabeth, for life with a remainder to William's children.<sup>286</sup> From 1805 until 1824 when the wife died, despite living in close proximity (within 3 miles), no claim was made upon either Dinah or Lavy.<sup>287</sup> After the wife, Elizabeth, died in 1824, the children (tenants in the remainder) took possession of the property, sold it, and divided the proceeds.<sup>288</sup> For over twenty years, Dinah or Lavy remained, acted, and lived as free Negro women.<sup>289</sup>

In 1832, an heir of the alleged former "Master" (William Mackubin) and his wife took action against Dinah, Lavy and their heirs by taking possession of them and their heirs and claiming them as slaves for life.<sup>290</sup> Petitioner filed this petition for freedom in 1832.<sup>291</sup> Petitioner won his freedom in the lower court, and the defendant appealed.<sup>292</sup>

The appellate court states that under the 1787 Act and case law: the fact that these slaves were allowed to "go at large" was a crime, and the extended period of time did not serve to cure that criminal activity.<sup>293</sup> The court of appeals reasoned that if the master (and later

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280. *Burke v. Negro Joe*, 6 G. & J. 136 (1834).

281. *Id.* at 137.

282. *Id.* at 136.

283. *Id.* at 137.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 138.

289. *See id.* at 137.

290. *Id.*

291. *Id.*

292. *Id.*

293. *See id.*; Act for Preventing Inconveniences Arising from Slaves Being Permitted to Act as Free, 204 MD. ARCHIVES 231 (1787).

“Colonial White Mater Privilege”

his wife) had allowed his slaves to act/be free without actually being free, he (and she) would have been guilty of a criminal act.<sup>294</sup> Thus, legal manumission by the master/owner during his lifetime must be presumed.<sup>295</sup> On this basis, the Court of Appeals of Maryland affirmed the judgment—thus, Negro Joe was freed.<sup>296</sup>

The court of appeals seems to include a note of warning for masters and slaves alike— “Although this case has received an ingenious and elaborate investigation by the counsel engaged in it, it would seem to be embraced within a very narrow compass.”<sup>297</sup>

“Colonial White Mater Privilege” is inapplicable here because there was no evidence of a White female ancestor. The petitioner prevailed on other grounds.

O. *Caton v. Carter*<sup>298</sup>

Petitioner claimed he was the son of a free person and (merely) held in indentured servitude (rather than being a slave) on September 2, 1834.<sup>299</sup> Petitioner alleged that after the death of his mistress (in indenture) several years later, no one made a claim to him.<sup>300</sup> Defendant sought to further bind the petitioner.<sup>301</sup> The orphans court found petitioner to be an orphan and a free boy, and bound him to another (not the defendant) in indenture (not slavery).<sup>302</sup> The defendant appealed.<sup>303</sup> Due to the improper procedure of the lower Court and its improper exclusion of relevant evidence, the court of appeals reversed and remanded.<sup>304</sup> “Colonial White Mater Privilege” is inapplicable here because there was no evidence of a White female ancestor.

P. *Henderson v. Jason*<sup>305</sup>

In 1849, petitioners (William, nineteen; Louisa, seventeen; Asbury, fifteen; and Reuben, thirteen or fourteen) sought a determination of their status as free persons (having been born to free

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294. *Burke*, 6 G. & J. at 138.

295. *Id.*

296. *Id.* at 138.

297. *Id.* at 141.

298. *Caton v. Carter*, 9 G. & J. 476 (Md. 1838).

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Id.* at 477.

305. *Henderson v. Jason*, 9 Gill 483 (Md. 1851).

persons).<sup>306</sup> Through witness' testimony, the petitioners provided evidence of the following facts.<sup>307</sup> In 1831, Rachel (then a slave), the mother of the petitioners, was allowed by her mistress to go and live with her reputed husband, Aaron Jason.<sup>308</sup>

Aaron Jason was at that time purported to be a free man.<sup>309</sup> Aaron bought his freedom in 1829 or 1830.<sup>310</sup> As such, Aaron and Rachel's mistress made an agreement that Rachel would belong to Aaron forever in exchange for Aaron agreeing to raise two of Rachel's children for the mistress' later use.<sup>311</sup> Two of Rachel's children (not the petitioners) were later delivered to the former Mistress (Sam—six months or a year after the Agreement; and Arch—five or six years after the agreement).<sup>312</sup>

From 1831 until 1851, Rachel acted as a free woman—with the assent of the mistress (Rachel and Aaron lived in close proximity to the mistress).<sup>313</sup> The mistress died in 1846.<sup>314</sup> When all three of the petitioners were born, Aaron was free, and Rachel was acting as free.<sup>315</sup> The petitioners have lived with their parents Aaron and Rachel since their births.<sup>316</sup>

In 1851, the defendants took the petitioners away from Aaron claiming that the four were slaves.<sup>317</sup> Petitioners prevailed in the trial court,<sup>318</sup> and the defendant appealed.<sup>319</sup> Petitioners proved that Aaron had bought his freedom, and, as a free man, contracted for his “wife” Rachel's freedom.<sup>320</sup> Therefore, the Court of Appeals of Maryland affirmed the decision.<sup>321</sup>

“Colonial White Mater Privilege” is inapplicable in this case as well, because there was no evidence of a White female ancestor. Petitioners prevailed on other grounds.

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306. *Id.*

307. *Id.* at 483-84.

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.* at 483.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.* at 487.

319. *Id.*

320. *Id.* at 484.

321. *Id.* at 493.

Q. *Jones v. Jones*<sup>322</sup>

In 1871, David Jones’ children petitioned to receive a share in their uncle’s, Andrew Jones, estate.<sup>323</sup> Andrew Jones, brother of David had died in 1870 intestate leaving a widow, but left no other heirs except for the petitioners.<sup>324</sup> A year after his death, Andrew’s widow, Frances Jones, the administratrix of the estate had not made an accounting and settlement of the estate.<sup>325</sup> The uncle’s widow denied a relationship between the children and her husband and demanded proof thereof.<sup>326</sup>

The trial court determined that the children were the legitimate offspring of David Jones (Andrew Jones’ brother) and entitled to their one-half portion of Andrew’s estate—the widow would retain the remaining one-half share.<sup>327</sup> The widow appealed.<sup>328</sup>

The court of appeals made the following findings.<sup>329</sup> David Jones and Andrew Jones were brothers—sons of Kate Jones.<sup>330</sup> David Jones, then a slave, married a free woman Hannah Williams.<sup>331</sup> Pursuant to the 1777 Act, David and Hannah were legally married.<sup>332</sup> They lived together as spouses—with some of their children being born before David was freed and some afterwards.<sup>333</sup>

David’s and Andrew’s deeds of manumission were executed in 1814 with David and Andrew’s freedom to begin some five years later (6 months apart in approximately 1819 or 1820).<sup>334</sup> Thus, David was free for approximately fifty years before his Brother Andrew’s death in 1870.<sup>335</sup>

Petitioners were born of a free woman—as such, they were all free from their births and thus, capable of inheriting.<sup>336</sup> “Colonial White Mater Privilege” did not apply to these facts. The petitioners won on other grounds.

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322. *Jones v. Jones*, 36 Md. 447 (Md. 1872).

323. *Id.* at 448.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

329. *Id.* at 450-52.

330. *Id.* at 453.

331. *Id.*

332. *Id.* at 455; Act Concerning Marriages, 203 MD. ARCHIVES 164-66 (1777).

333. *Jones*, 36 Md. at 453.

334. *Id.*

335. *Id.* at 453-54.

336. *Id.* at 455.

## VI. ECONOMIC DISPARITY FOR BLACK FAMILIES INTO THE TWENTY-FIRST CENTURY

Beginning with the land grant system as established in the U.S. Colonies,<sup>337</sup> wealth is closely held in the United States.<sup>338</sup> How is wealth defined?

Wealth is the total value of a family's financial resources minus all debts. Income includes earnings from work or its substitutes, like pension, disability, unemployment insurance, or social assistance. Wealth is a special kind of money because it represents ownership and control of resources; income is essentially earnings or payments that replace earnings.<sup>339</sup>

In 2001, the top 5% of the nation's wealthiest households held 67% of the entire U.S. wealth.<sup>340</sup> By 2004-2005, the top 20% of the income earners held 84% of total wealth in the U.S.—while the bottom 20% held 0% of total U.S. wealth.<sup>341</sup> These are astounding statistics.

On average, a Black family has \$0.10 of wealth for every \$1.00 that a White family has.<sup>342</sup> Additionally, in 2002, the racial wealth gap—the difference between the wealth of the average Black family versus the average White family—was estimated at over \$82,000—a \$20,000 increase (in disparity) since 1980.<sup>343</sup> This is despite the fact that—in 1989—on average a Black family earned \$0.55 for every \$1.00 earned by a White family.<sup>344</sup> By 2000, a Black family's earnings rose to \$0.64 for every \$1.00 earned by a White family.<sup>345</sup> However, in

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337. See generally 2 PATTON AND PALOMAR ON LAND TITLES § 307 (3d ed. 2011); Hannah Benner Roach, *The First Purchasers of Pennsylvania*, in PASSENGERS AND SHIPS PRIOR TO 1684 (Walter Lee Sheppard Jr. ed., Heritage Books 1992).

338. See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995) (describing racial inequality based on an analysis of private wealth).

339. Thomas M. Shapiro, *Race, Homeownership and Wealth*, 20 WASH. U. J.L. & POL'Y 53, 53-54 (2006).

340. OLIVER & SHAPIRO, *supra* note 338, at 200.

341. See EMMA COLEMAN JORDAN & ANGELA P. HARRIS, WHEN MARKETS FAIL: RACE AND ECONOMICS 73-75 (2006) (discussing the increase in the number of persons living in poverty in the U.S. from the 1990s into the 2000s); THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 44 (2004) [hereinafter SHAPIRO, THE HIDDEN COST] (stating that by 1998, the top 20% controlled 84% of total household wealth); Palma Joy Strand, *Inheriting Inequality: Wealth, Race and the Laws of Succession*, 89 OR. L. REV. 453, 459 (2010);

342. ROBINSON, *supra* note 12, at 62.

343. OLIVER & SHAPIRO, *supra* note 338, at 204.

344. SHAPIRO, THE HIDDEN COST, *supra* note 341, at 47-49.

345. *Id.* at 7.



terms of sheer numbers, there are twice as many Whites than Blacks in the bottom quintile of wealth holders in the United States—56% versus 23%.<sup>346</sup> In sum, in every area of possible statistical measure, Blacks lag behind the American mainstream—these socio-economic gaps are static (rather than fluid or changeable) in nature.<sup>347</sup>

Blacks not only earn less than Whites, they will inherit less than Whites.<sup>348</sup> On average one in four White adults inherits money; while one in twenty Black adults inherit.<sup>349</sup> In 1999, the mean net worth of Black parents was \$95,000 versus \$506,000 for White parents; with the median being \$47,000 versus \$199,000.<sup>350</sup> Approximately 21% of Black parents have enough assets to give their children enough money to assist with the down payment for a house—while 51% of White parents have this financial capability.<sup>351</sup> In total, so-called “baby boomers” (adults born between 1947 and 1964) will inherit nine trillion dollars between the years of 1990 and 2030.<sup>352</sup>

Racial disparity continues with regards to inheritance.<sup>353</sup> It has been estimated that Black adults of the “baby-boomer” era will inherit \$0.13 for every \$1.00 inherited by White baby boomers.<sup>354</sup> This translates into a mean amount of inheritance of \$16,000 for Blacks versus \$125,000 for Whites.<sup>355</sup> Twenty-eight percent of Whites inherit—while only 7.7% of Blacks inherit.<sup>356</sup>

Even at the upper end of the spectrum, the disparity is startling: the mean net worth of upper-middle-class Black families is \$96,000 versus \$460,000 for similarly characterized White families.<sup>357</sup> Nationwide, in 2002, the rate of homeownership had reached 68% (and 69% by 2004) which was a historic high.<sup>358</sup> In addition, “home wealth ac-

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346. Strand, *supra* note 341, at 469.

347. ROBINSON, *supra* 12, at 7, 61.

348. SHAPIRO, THE HIDDEN COST, *supra* note 341, at 67.

349. *Id.* at 67.

350. *Id.* at 63, 98.

351. *Id.* at 64.

352. *Id.* at 5.

353. *Id.* at 67, 69.

354. *Id.* at 67.

355. *Id.*

356. *Id.* at 69.

357. *Id.* at 98.

358. *See id.*, at 3, 211; Shapiro, *supra* note 339, at 59. In general terms, according to 2003 statistics:

[O]nce income reaches \$30,000, the majority of all households are homeowners. When income reaches \$80,000, 85% of all households are homeowners, and once income reaches \$120,000, 92% of all households are homeowners. . . . All homeowners have 48% of their net worth represented by their homes. Low-income homeowners have 80% of their net worth represented by their homes and upper-income homeowners

counts for 60% of the total wealth among America's middle class."<sup>359</sup> However, the 1998 U.S. Census showed that 74% of Whites were homeowners versus 48% of Blacks.<sup>360</sup> By the 2005 U.S. Census, the figures for those who owned homes had not changed considerably: White (76%), Asians (61%), Latinos (49%), and Blacks (48%).<sup>361</sup> In 1988, according to Melvin Oliver and Thomas Shapiro, 66% of White homeowners had measurable home equity, while 42% of Black owners could show the same.<sup>362</sup> In addition, for White homeowners, home equity was only 43% of net worth, while Black homeowners' home equity was 63% of their net worth.<sup>363</sup> Researchers Melvin Oliver and Thomas Shapiro attribute this disparity to three reasons: (1) Blacks have a decreased ability to access or gain credit, (2) Blacks are assessed higher interest rates, and (3) housing markets in predominantly Black residential neighborhoods appreciate at a slower rate than housing markets in predominantly White neighborhoods (more specifically, when a neighborhood consists of more than 10% Black residents, home values begin to decline).<sup>364</sup>

The sub-prime lending boom and collapse has also disproportionately affected the Black family in the U.S. resulting in additional disparate treatment. More specifically,

The National Community Reinvestment Coalition explored how pricing disparities resulting from intensified sub-prime lending in minority areas occurred. Essentially, [W]hite and [B]lack testers with similar credit records and qualifications applied for pre-approval for mortgages. Given similar scripts and profiles (with Afri-

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have 26% of their net worth represented by their homes. Home equity, therefore, is a significant part of low-income net worth, less significant for the typical non-low-income homeowner, and a very insignificant part of upper-income net worth. Put another way, low-income homeowners have virtually all of their net worth tied up in their homes, while upper-income homeowners have very little net worth tied up in their homes.

Dorothy A. Brown, *Shades of the American Dream*, 87 WASH. U. L. REV. 329, 340-41 (2009).

359. Shapiro, *supra* note 339, at 59.

360. OLIVER & SHAPIRO, *supra* note 338, at 213; SHAPIRO, *THE HIDDEN COST*, *supra* note 341, at 109.

361. See U.S. Census Bureau, Series No. H-150-05, AMERICAN HOUSING SURVEY FOR THE UNITED STATES: 2005 42, tbl.2-1 (2006), available at <http://www.census.gov/prod/2006pubs/h150-05.pdf> (last visited Nov. 2, 2011).

362. OLIVER & SHAPIRO, *supra* note 339, at 108 tbl.5.3.

363. See *id.* at 108 tbl.5.3, 216.

364. See *id.* at 211; Shapiro, *supra* note 339, at 66-69. Randall Robinson lists additional factors: high infant mortality, low income, high unemployment, substandard education, capital incapacity, insurmountable credit barriers, high morbidity, high rates of incarceration (for example, in the State of Washington, blacks are less than four percent of the general population, but comprise almost forty percent of the prison population, and below-average life-span; all combining to formulate the so-called "conditioned expectation" which results in a cycle of poverty rampant within the African-American community). ROBINSON, *supra* note 12, at 62, 102.

“Colonial White Mater Privilege”

can Americans actually presenting better qualifications), the testing uncovered a 45% rate of disparate treatment based on race. The testing revealed practices that may have destructive effects on African-American families and communities. These include differences in interest rates quoted; differences in information about fees, rates, loan programs, and loan terms; and more frequent referrals of [W]hites to the lender’s prime lending division.<sup>365</sup>

Additionally, the general segregation of Blacks into ghettos within large U.S. cities continued throughout the twentieth century—and persists today.<sup>366</sup> The current-day racial divide has been described as the following:

Today’s most serious racial injustices aren’t caused by bias and bigotry; instead they stem from racial segregation and the many disadvantages that follow from living in isolated, economically depressed, and crime-ridden neighborhoods. These problems are a legacy of past racism . . . . [T]oday, the biggest racial problem facing the country isn’t discrimination, but rather the deep inequality that has created almost two different Americas, one [B]lack and poor and the other a more prosperous, multi-racial mainstream.<sup>367</sup>

Several over-arching societal and economic indicators helped to spawn and spur the wealth inequities between Blacks and Whites, namely: (1) credit card debt; (2) the availability of home equity to pay down debt; (3) the subprime mortgage market (and its implosion);<sup>368</sup> (4) changes to the bankruptcy laws; and (5) high rates of adult male incarceration.<sup>369</sup> Alarming, in the U.S. today, Black adult males are more likely to be imprisoned than to earn a college degree.<sup>370</sup> Further, despite the fact that African Americans and Hispanics comprise

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365. Shapiro, *supra* note 339, at 71-72.

366. See generally DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993) (linking persistent poverty to perpetual segregation experienced by African Americans in the United States).

367. Richard Thompson Ford, *The End of Civil Rights*, BOS. GLOBE, May 05, 2009, available at 2009 WLNR 9383675; see also ROBINSON, *supra* note 12, at 226-68 (discussing how slavery impacted the current economical state of blacks).

368. It has been projected that approximately 2,200,000 homeowners with subprime loans originating between 1998 and 2006 may ultimately lose a total of 164 billion dollars in housing wealth due to home foreclosure. See Ellen Schloemer et al., *Losing Ground: Foreclosures in the Subprime Market and Their Cost to Homeowners*, CTR. FOR RESPONSIBLE LENDING (Dec. 2006), <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosure-paper-report-2-17.pdf>. It was predicted that subprime foreclosures will affect: ten percent of recent African American borrowers; eight percent of recent Latino borrowers and four percent of recent White borrowers. *Id.*

369. OLIVER & SHAPIRO, *supra* note 338, at 220-26.

370. JORDAN & HARRIS, *supra* note 341, at 69.

25% of the total U.S. population, 63% of the 2 million people imprisoned in the U.S. are members of those two racial classifications.<sup>371</sup>

## CONCLUSION

Without a doubt, the color-lines that were clearly drawn in Colonial America still exist in the twenty-first century. Furthermore, as was discussed in Part VI, the struggles of our ancestors in both gaining their freedom from slavery and reclaiming their property rights through the claim of Colonial White Mater Privilege have been undermined by the continuation of economic racial disparity into the twenty-first century.

As Palma Joy Strand stated, “Anyone who grows up in the United States is steeped in the social construction of race. We ‘see’ race from a very early age. Though we may be ‘colormute,’ we are by no means ‘colorblind.’”<sup>372</sup> Then-Senator Barack Obama addressed the issue as follows:

Legalized discrimination—where blacks were prevented, often through violence, from owning property, or loans were not granted to African American business owners, or black homeowners could not access FHA mortgages, or blacks were excluded from unions, or the police force, or fire departments—meant that black families could not amass any meaningful wealth to bequeath to future generations. That history helps explain the wealth and income gap between black and white, and the concentrated pockets of poverty that persists in so many of today’s urban and rural communities. . . . It’s a racial stalemate we’ve been stuck in for years.<sup>373</sup>

As proponents of reparations argue, had it not been for slavery, the current wealth inequities between Blacks and Whites would be less, or non-existent.<sup>374</sup> For over 200 years, slaves were denied the

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371. *Id.*

372. Strand, *supra* note 341, at 473 (citation omitted).

373. Senator Barack Obama, A More Perfect Union Remarks at the Constitution Center in Philadelphia, PA (Mar. 18, 2008), available at [http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th\\_n\\_92077.html](http://www.huffingtonpost.com/2008/03/18/obama-race-speech-read-th_n_92077.html).

374. See generally BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS (1973) (discussing the historical provisions and statutes forming a basis for claims to reparations, the precedent for such claims, and the obstacles to national policy reparations); ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2004) (arguing for a model of atonement that demands both a government apology and cash reparations for American slavery); Joe R. Feagin, *Documenting the Costs of Slavery, Segregation, and Contemporary Racism: Why Reparations Are in Order for African Americans*, 20 HARV. BLACK LETTER L.J. 49 (2004) (examining why large-scale reparations should be made to African Americans and how that task might be accomplished). Professor Alice Thomas takes another approach by proposing the “Closing the Wealth Gap Truth Commission” as a “remedial forum for bringing together govern-

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ability and opportunity to maintain the “fruits of their labor” and/or income for this labor.<sup>375</sup> Now more than 200 years after slavery, the deleterious effects linger on. Bernard Boxill argued nearly twenty years ago that:

One of the reasons for which blacks claim the right to compensation for slavery [through reparations] is that since the property rights of slaves to ‘keep what they produce[d]’ were violated by the system of slavery to the general advantage of the white population, and, since the slaves would presumably have exercised their libertarian right to bequeath their property to their descendants. Their descendants, the present black population, have rights to that part of the wealth of their inheritance.<sup>376</sup>

Perhaps it is time for twenty-first century “land reclamation” suits brought in the names of our ancestors to claim the long-ago promised proverbial “40 acres and a mule”<sup>377</sup> in an effort to rectify current systemic wealth inequities suffered by the Millennial ordinary family.<sup>378</sup>

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ment officials, citizen victims and bystanders to dialogue, inform and generate present-day solutions for eliminating the racial wealth divide and ameliorating its consequences.” See Alice M. Thomas, *The Racial Wealth Divide Through the Eyes of the Younger Family: Undoing America’s Legacy of Wealth Inequality in Search of the Elusive American Dream Utilizing a Sankofa Model of Transitional Justice*, 5 FLA. A & M U. L. REV. 1, 8 (2009).

375. Robinson had this to say in his book:

Let me try to drive the point home here: through keloids of suffering, through coarse veils of damaged self-belief, lost direction, misplaced compass, . . . racial transmutation, black people worked long, hard, killing days, years, centuries [246 years]—and they were never *paid*. The value of their labor went into others’ pockets – plantation owners, northern entrepreneurs, state treasuries, the United States government. Where was the money? Where *is* the money? There is a debt here.

ROBINSON, *supra* note 12, at 207 (emphasis in original).

376. BERNARD BOXILL, *BLACKS AND SOCIAL JUSTICE* 36 (Revised ed. 1992).

377. Major General W.T. Sherman’s Special Field Order No. 15 was issued on January 16, 1865. See Order by the Commander of the Military Division of the Mississippi, Freedmen & Southern Society Project (Jan. 16, 1865), available at <http://www.history.umd.edu/Freedmen/sfo15.htm>. This order granted to former slaves who were heads of households forty acres of tillable ground (formerly owned by slave-owners in the low lands of South Carolina) and a mule to plow the land. *Id.* By June of 1865, approximately 40,000 former slaves had settled on 40,000 acres of land. *Field Order No. 15*, in *ENCYCLOPEDIA OF ANTISLAVERY AND ABOLITION: VOL. I* 253 (Peter Hinks & John McKivigar, eds., 2007). However, by the summer and fall of 1865, then-President Andrew Johnson had effectively reversed the Order. *Id.*

378. Writing in support of reparations, Randall Robinson concludes his book *THE DEBT: WHAT AMERICA OWES TO BLACKS* as follows: “Unlike those who came to America of their own volition, African Americans are underrepresented in the councils of political power and finance . . . This is a struggle that we cannot lose, for in the very making of it we will discover, if nothing else, ourselves.” ROBINSON, *supra* note 12, at 247.

APPENDIX A  
MARYLAND STATUTE SUMMARY CHART

1658	Servants having bastards	V. 1 373-374	If mother cannot prove who the father is, then she is liable for damages to lost service; A servant father is liable for half the damages and a free father is liable for all damages.
1664	Miscegenation	V. 1 533-534	Freeborn White women intermarrying w/ Negro man serves for life of husband & children serve according to condition of father. Children of White women & Black men already married serve until they are thirty years old.
1681	Miscegenation	V. 7 203-205	Children serve according to condition of the father. Free White or White servant who marries a Negro is free & children free as well. Master/mistress fined 10,000 lbs. of tobacco for allowing interracial marriage. Minister performing ceremony is fined 10,000 lbs. of tobacco.
1692	Miscegenation	V. 13 546-549	Children of Negroes/slaves served according to condition of parents. <i>Free White women or men marrying Negro:</i> serves seven years for ministry/poor; children serve until twenty-one-years-old; the Negro man becomes slave for life. <i>White servant intermarrying w/ Negro:</i> Without consent of master-finish term of service plus any damages from having children; additional seven years for ministry or poor; children serve until twenty-one years old. With master's consent-women and children are free; Women serves seven years for ministry/poor; children serve until twenty-one; masters fined. <i>Free White women pregnant by Negro:</i> serves seven years for ministry/poor; negro man serves seven years if he is free. <i>Servant White woman pregnant by Negro:</i> serves term plus any damages for children; children serve until thirty-one-years-old. Minister who marries interracial couple fined.
1699	Miscegenation	V. 22 546-553	<i>Free White women pregnant by Negro:</i> serve for seven years; children serve until thirty-one years old. <i>White servant women pregnant by Negro:</i> finish term plus damages, serve additional seven years and children serve until thirty-one years old. <i>Negro man:</i> if free, serves for seven years <i>White man:</i> serves seven years.
1704	Miscegenation	V. 26 254-261	<i>Free White women pregnant by Negro:</i> serve for seven years; children serve until thirty-one years old. <i>White servant women pregnant by Negro:</i> finish term plus damages, serve additional seven years; and children serve until thirty-one years. <i>Negro men:</i> if free, serve for seven years. <i>White men:</i> serve seven years.

*“Colonial White Mater Privilege”*

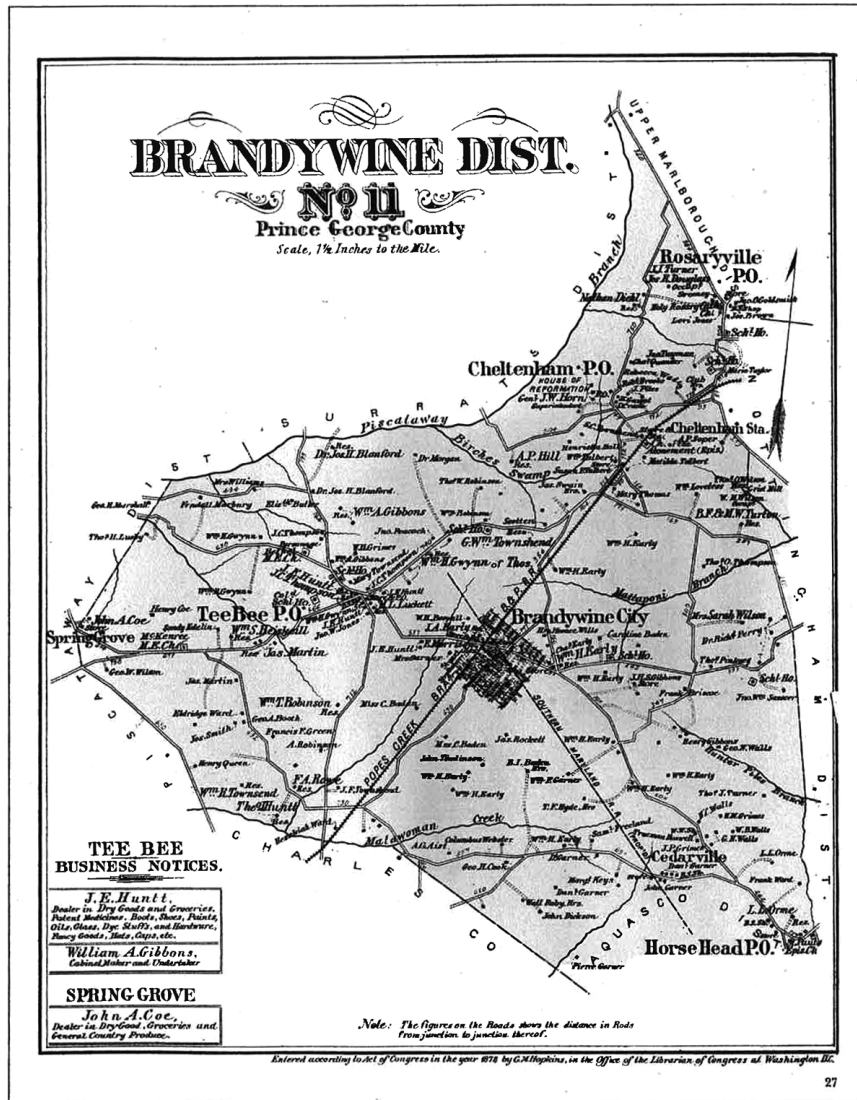
1715	Miscegenation	V. 30 283-292	<i>Free White women pregnant by Negro:</i> serve for seven years; children serve until thirty-one-years-old. <i>White servant women pregnant by Negro:</i> finish term plus damages, serve additional seven years; and children serve until thirty-one-years-old. <i>Negro men:</i> if free, serve for seven years. <i>White men:</i> serve seven years.
1717	Penalty for interracial marriages	V. 33 111-113	<i>Free Negro or Mulattoes marrying a White person:</i> slaves during their lives, unless it is a mulatto born of a White woman who becomes servant for seven years. <i>White men/women:</i> servants for seven years.
1728	Supplement to Miscegenation Provisions	V. 36 275-276	Free mulatto women having bastard children: serve seven years; children serve until thirty-one-years-old. Free Negro women having bastards w/ White men: Serve seven years; children serve until thirty-one years old.
1752	Manumission	V. 50 76-78	Slaves who are old or unable to work may not be set free, but must be cared for by owner. No slaves to be set free by last will and testament. Manner of setting free: in writing, with two witnesses.
1790	Manumission	V. 204 458-459	Slaves may be set free by last will and testament.
1792	Manumission	V. 105 249-256	Slaves may be freed by last will and testament Healthy slaves may be freed.
1804	Valuation of real and personal prop	V. 560 60-68	Valuation of slaves by sex and ages.
1810	Manumission of Negro or mulatto female slaves	V. 570 117-118	Where Negro or mulatto female slaves are declared free after term of years or specified age, the person so freeing them can make provisions on the children born during period of service. If the writing is silent as to the children, they are deemed slaves.
1810	Manumissions under previous act	V. 599 8	Deeds of manumission recorded but not properly witnessed are valid. No person can sell or dispose of such slaves so freed.
1827	Manumissions	V. 437 205-206	Deeds or writings of manumission recorded but not properly witnessed are valid provided slaves not over forty-five or under ten and have been free at least seven years. Copy of deed is good and sufficient evidence.
1835	Allowing named persons to convey prop	V. 541 193-194	The named free persons of color acquired property and were allowed to transfer to their children.
1858	Manumission	V. 624 463	Slaves given freedom conditioned on leaving the state are not free until they have left the state. Freed slaves must be between ten to forty-five-years-old and capable of providing for themselves.
1860	Manumission	V. 588 484-485	Manumission of slaves prohibited; free Negroes may renounce freedom.
1864	Manumission	V. 531 130-131	Slaves may be manumitted by deed and will.
1879	Revised Code: Marriage	V. 388 477-483; 807-808	Minister fined \$100 for marrying White and Negro. White woman pregnant with Negro or mulatto child serves eighteen months to five years in penitentiary.

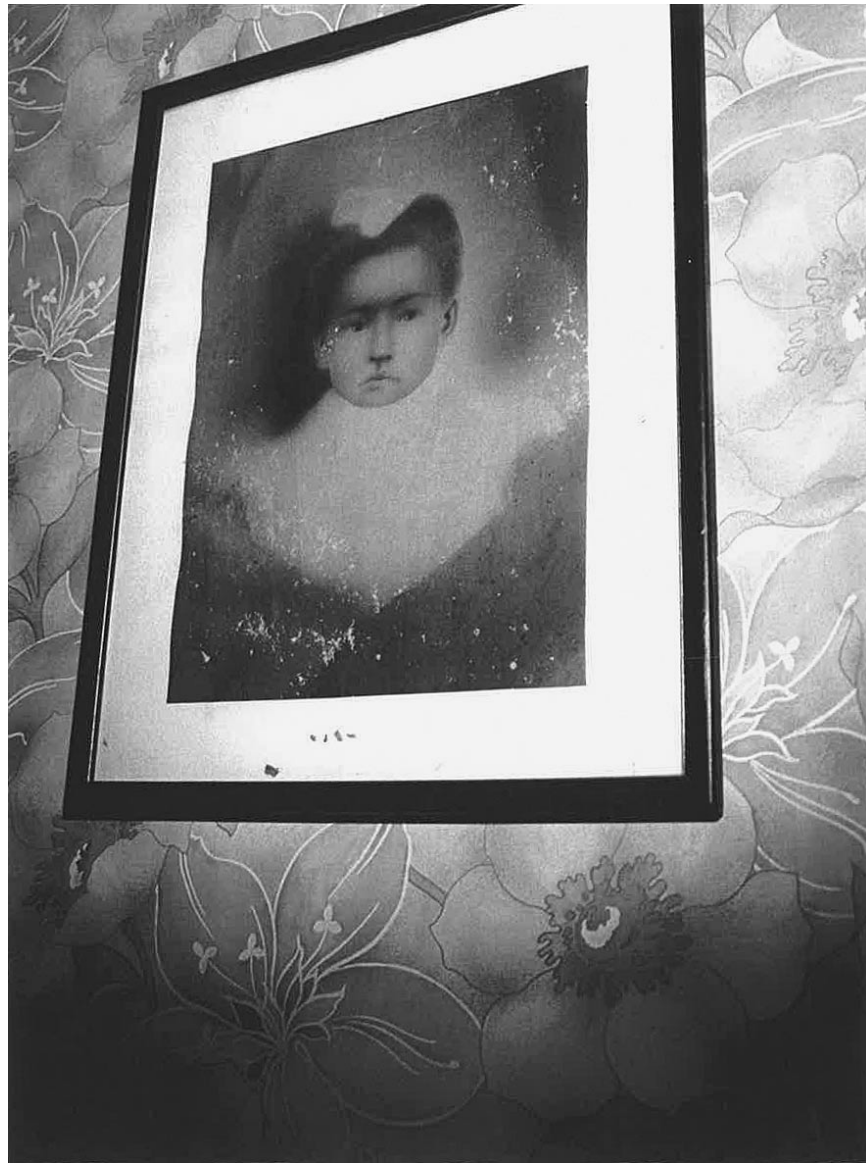
**APPENDIX B**

**Relevant Historical  
Documents, Photos and Maps.**



“Colonial White Mater Privilege”





MARY KNOX circa 1856

*“Colonial White Mater Privilege”*



CLARENCE HAWKINS circa 1870



ALBERT OWEN SHORTER circa 1900

*“Colonial White Mater Privilege”*



**NORMAN TANNER HARRIS**  
Biology

255 E. Johnson Street Harrisonburg, Va.  
ΩΨΦ; Intramural Football, 3-4; Veterans  
Club, 3; Art Guild, 4.



**ROBERT O. HAWKINS**  
Sociology

AΦA; Veterans Club, 3.

**... LION 1948 ...**

“Cat” . . . arch handshaker . . . “I mean”  
. . . won the good-housekeeping seal . . .  
those ties! . . . a gift to the fairer sex.



“Howdy-Doody” . . . the beard . . . “Hawk”  
. . . Budd’s city boy . . . a reserved gentle-  
man . . . jingle contest fan.



*Thirty*



1810 United States Federal Census

Name: **Henny Shorter**  
County: **Saint Mary's**  
State: **Maryland**

**Source Citation:** Year: 1810; Census Place: , Saint Mary's, Maryland; Roll: 16; Page: 174; Image: 94.00.

**Source Information:**

Ancestry.com. *1810 United States Federal Census* [database on-line]. Provo, UT, USA: The Generations Network, Inc., 2004. Original data: United States of America, Bureau of the Census. *Third Census of the United States, 1810*. Washington, D.C.: National Archives and Records Administration, 1810. M252, 71 rolls.

**Description:**

This database details those persons enumerated in the 1810 United States Federal Census, the Third Census of the United States. In addition, the names of those listed on the population schedule are linked to the actual images of the 1810 Federal Census. Enumerators of the 1810 census were asked to include the following categories in the census: name of head of household, number of free white males and females, number of other free persons except Indians, number of slaves, town or district and county of residence.

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"Colonial White Mater Privilege"

173	Joseph Dunbar	2													3	
	William Reddy														9	
	Julian Lull														6	
	W <sup>m</sup> Bradburn	1			3										3	
	Jessica Morgan	1													5	
	William Dunbar	1			4										2	
	James Overcup			2											15	
	Philip King	2													10	
	Henry Kitter	1													2	
	Elizabeth Muffel	1													1	
	John Dunbar														2	
	William Smith														2	
	Bernard McFarwell	2													1	
	John Smith														2	
	175	Edward Muffel	3	2												2
Margaret Muffel		3													4	
Edward Muffel		1													2	
Ely. J. Biscoe		1	2												10	
John Hunt		2													2	
Joseph Cambridge		1													15	
174		John Hastings														3
		Jessica Dunbar	1													50
	John Fryer	2			2										10	
	George Butler	4		2											14	
	Alexander Baynes														7	
	Ignatius Dunbar	1													2	
	William Thomas														4	
	John Williams	1													2	
	Henry Little														2	
	Mattias Muffel														3	
	John Johnson	2	3			2									3	
	John Bright	1				6									4	
	John Bradburn	1													2	
	James Muffel														3	
	John Biscoe														1	
	Elizabeth Bullis	1	2												1	
	Joseph Blount														1	
Polly Hunt														11		
Lynia Benson														1		



1810 United States Federal Census

Name: **Henry Shorter**  
County: **Saint Mary's**  
State: **Maryland**

**Source Citation:** Year: 1810; Census Place: , *Saint Mary's, Maryland*; Roll: 16; Page: 191; Image: 103.00.

**Source Information:**

Ancestry.com. *1810 United States Federal Census* [database on-line]. Provo, UT, USA: The Generations Network, Inc., 2004. Original data: United States of America, Bureau of the Census. *Third Census of the United States, 1810*. Washington, D.C.: National Archives and Records Administration, 1810. M252, 71 rolls.

**Description:**

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"Colonial White Mater Privilege"


191	William Edmunds	1	1	2				3	1	1	1	
	Joseph Edmunds (son)	3	1					3		1		
	James Swinton							1	1	1		
	Thomas Ruffin			1					1			
	Joseph Deane	1		1				1		1		
	Heath & Shaw	5	3	1				2	1	1	2	
	(Thomas Ruffin)									1	3	
	Charles Kebley (son)	3		2				1	2	1		
	Soo Loh (lth)										3	
	Paragon Bahago	1						2	1	1	1	
	John Payne	3	1	1	1			1	1	1	2	
	Michael Raley	1						1	2	1	6	
	Joseph Stropoff	3						2	1	1		
	John Briscoe	1		1	1				2		2.4	
Charles Hill			1				1	1	1	2		
Thomas Tappan (son)										2		
Henry Thorne (lth)										5		
192	Stephens Farming				1					2	1	3
	Paragon James	2			1	1		2	1	1		6
	Abraham Foxman	2			1	1						3
	Henrietta Mayson									1	1	3
	Deanna Johnson				1				1			4
	Parad F. Johnson	1	1						3			7
	(Melby Swine lth)										1	9
	Henry Koopman											8
	John Hill				1							6
	Richard Mellow	1			1						2	8
	Basil Jarboe	2	3		1	1			1		1	2
	James Nelson	1	1	1	1			1				7
	Paragon Long	2	1	2		1	1	2		2		7
	(Thomas Deane)										1	
	Kath. H. Hayes	1	1								2	8
	Francis Blum	3			1							
John B. Mowen	1	2	1				1				14	



1820 United States Federal Census

Name:	<b>Letty Shorter</b>
Township:	<b>Georgetown</b>
County:	<b>Washington</b>
State:	<b>District of Columbia</b>
Enumeration Date:	<b>August 7, 1820</b>
Slaves - Females - thru 44:	<b>1</b>
Free Colored Persons - Females - Under 14:	<b>1</b>
Free Colored Persons - Females - 26 thru 44:	<b>1</b>
Total Slaves:	<b>1</b>
Total Free Colored Persons:	<b>2</b>
Total All Persons - White, Slaves, Colored, Other:	<b>3</b>

**Source Citation:** 1820 U S Census: Georgetown, Washington, District of Columbia, Page: 21; NARA Roll: M33\_5; Image: 28.

**Source Information:**  
 Ancestry.com. 1820 United States Federal Census [database online]. Provo, UT, USA: Ancestry.com Operations, Inc., 2010. Images reproduced by FamilySearch.

Original data: Fourth Census of the United States, 1820. (NARA microfilm publication M33, 142 rolls). Records of the Bureau of the Census, Record Group 29. National Archives, Washington, D.C.

**Description:**  
 This database details those persons enumerated in the 1820 United States Federal Census, the Fourth Census of the United States. In addition, the names of those listed on the population schedule are linked to the actual images of the 1820 Federal Census. Enumerators of the 1820 census were asked to include the following categories in the census: name of head of household, number of free white males and females, number of other free persons except Indians, number of slaves, town or district and county of residence. [Learn more...](#)



SCHEDULE I. - Free Inhabitants in the District of Columbia in the County of Washington, enumerated by me, on the 25<sup>th</sup> day of July, 1850. (Wm. A. Raker, Ass't)

The Name of every Person whose usual place of abode on the first day of June, 1850, was in the Family.

1	2	3	4	5	6	7	8	9	10	11	12
Household	Name	Sex	Color	Profession, Occupation, or Trade	Value of Real Estate	Place or Name	Whether deaf, dumb, insane, idiotic, pauper, or convict.				
546 607	Betty Pearl	50	F	ch.							
	Mary Swine	29	F	ch.		Cartman					
	Melita Swine	20	F	ch.							
547 608	Basil Sponten	52	M	B		Cartman		400			
	Mary Sponten	48	F	ch.							
548 609	Mary Edlewe	76	F	ch.		laborer		100			
	Elizabeth Edlewe	75	F	B							
549 610	Robert Evans	52	M	ch.		servant					
	Mary Evans	31	F	ch.							
	Melita Evans	1	F	ch.							
	Mannah Bailey	44	F	ch.							
	David Beckett	24	M	B							
	Robert Beckett	25	M	B							
550 611	Mary Kagan	32	F	ch.		laborer					
	John Kagan	20	M	ch.							
551 612	Christina Jackson	19	F	B							
613	Mrs. Kitchins	25	F	B		servant					
	Maria Kitchins	24	F	B							
	Lucy Keiser	40	F	ch.							
552 615	Maria Butler	29	F	B							Blind
	Mrs. M. Butler	9	F	B							
	John Butler	5	M	B							
	John F. Butler	3	M	B							
616	Dave Brown	61	M	B							
617	Benjamin Smith	20	M	B							
553 618	George Sant	45	M	B		laborer					
	Michael Sant	42	M	B							
	James Sant	11	M	B							
	John Sant	7	M	B							
	George Sant	6	M	B							
	William Sant	2	M	B							
	Mary Sant	25	F	B							
617	Mary A. Sant	34	F	ch.							
	George Sant	14	M	B		laborer					
	James A. Sant	4	M	B							
554 618	Richmond Poley	50	M	B		servant		100			
	Julia Poley	40	F	B							
	Mannah Poley	20	F	B							
	Elizabeth Poley	18	F	B							
555 619	Elizabeth Cady	42	F	B							
	Joseph A. Cady	21	M	ch.		servant					
	Joseph Cady	19	M	B		servant					

2094  
227





United States Federal Census

Name: **Clarence E. Hawkins**

Home in 1880: **Brandywine, Prince Georges, Maryland**

Age: **4**

Estimated Birth Year: **abt 1876**

Birthplace: **Maryland**

Relation to Head of Household: **Son**

Father's Name: **Clarence Hawkins**

Father's birthplace: **Maryland**

Mother's Name: **Harriet Hawkins**

Mother's birthplace: **Maryland**

Neighbors: [View others on page](#)

Marital Status: **Single**

Race: **Mu**

Gender: **Male**

Cannot read/write:

Blind: [View image](#)

Deaf and dumb:


Otherwise disabled:

Idiotic or insane:

Household Members:	Name	Age
	<a href="#">Clarence Hawkins</a>	<b>30</b>
	<a href="#">Harriet Hawkins</a>	<b>28</b>
	<a href="#">William H. Hawkins</a>	<b>5</b>
	<a href="#">Clarence E. Hawkins</a>	<b>4</b>
	<a href="#">Sophia Hawkins</a>	<b>3</b>
	<a href="#">Herman Hawkins</a>	<b>2</b>
	<a href="#">Eveline Hawkins</a>	<b>93</b>

**Source Citation:** Year: 1880; Census Place: Brandywine, Prince Georges, Maryland; Roll: 514; Family History Film: 1254514; Page: 217B; Enumeration District: 131; Image: 0056.

**Source Information:**



Ancestry.com and The Church of Jesus Christ of Latter-day Saints. 1880 United States Federal Census [database on-line]. Provo, UT, USA: Ancestry.com Operations Inc, 2010. 1880 U.S. Census Index provided by The Church of Jesus Christ of Latter-day Saints © Copyright 1999 Intellectual Reserve, Inc. All rights reserved. All use is subject to the limited use license and other terms and conditions applicable to this site.

Original data: Tenth Census of the United States, 1880. (NARA microfilm publication T9, 1,454 rolls). Records of the Bureau of the Census, Record Group 29. National Archives, Washington, D.C.

**Description:**  
This database is an index to 50 million individuals enumerated in the 1880 United States Federal Census. Census takers recorded many details including each person's name, address, occupation, relationship to the head of household, race, sex, age at last birthday, marital status, place of birth, parents' place of birth. Additionally, the names of those listed on the population schedule are linked to actual images of the 1880 Federal Census. [Learn more...](#)

"Colonial White Mater Privilege"

1	2	3	4	5	6	7	8	9	10	11	12	13	14
	8	8	Hawkins Clarence	W. H.	30				1			Farmer & Planter	✓
			— Harriet	W. F.	25	Wife			1			Keeping House	
			— William H.	W. H.	5	Son			1				
			— Clarence B.	W. H.	11	Son			1				
			— Sophia	W. F.	3	Daughter			1				
			— Herman	W. M.	2	Son			1				
			— Pauline	W. F.	13	Sister			1				
	9	9	Hawkins Henry	W. H.	50				1			Farmer & Planter	✓
			— Catherine	W. F.	18	Wife			1			Keeping House	

(1884.)

Page No. 2      Note A.—The Census Year begins June 1, 1880, and ends May 31, 1880.  
 Note B.—All persons will be included in the Enumeration who were living on the 1st day of June, 1880. No others will. Children BORN SINCE June 1, 1880, will be OMISSION. Members of Families who have DIED SINCE June 1, 1880, will be INCLUDED.  
 Note C.—Questions Nos. 23, 24, 25, and 26 are not to be asked in respect to persons under 10 years of age.

Superior's Dist. No. 3  
 Enumeration Dist. No. 131

SCHEDULE I.—Inhabitants in Franklin Township, in the County of Franklin, State of Ohio, enumerated by me on the 13 days of June, 1880.

J. H. Johnson

Inhabitants	Sex	Age	Color	Profession, Occupation, or Trade	Place of Birth	Married		Single		Total		Total
						Male	Female	Male	Female	Male	Female	
James Jones	Male	45	White	Farmer	Ohio	✓						
John Smith	Male	35	White	Blacksmith	Ohio			✓				
...	...	...	...	...	...	...	...	...	...	...	...	...

Form No. 1—Schedule I.  
 Form No. 2—Schedule II.  
 Form No. 3—Schedule III.  
 Form No. 4—Schedule IV.  
 Form No. 5—Schedule V.  
 Form No. 6—Schedule VI.  
 Form No. 7—Schedule VII.  
 Form No. 8—Schedule VIII.  
 Form No. 9—Schedule IX.  
 Form No. 10—Schedule X.  
 Form No. 11—Schedule XI.  
 Form No. 12—Schedule XII.  
 Form No. 13—Schedule XIII.  
 Form No. 14—Schedule XIV.  
 Form No. 15—Schedule XV.  
 Form No. 16—Schedule XVI.  
 Form No. 17—Schedule XVII.  
 Form No. 18—Schedule XVIII.  
 Form No. 19—Schedule XIX.  
 Form No. 20—Schedule XX.  
 Form No. 21—Schedule XXI.  
 Form No. 22—Schedule XXII.  
 Form No. 23—Schedule XXIII.  
 Form No. 24—Schedule XXIV.  
 Form No. 25—Schedule XXV.  
 Form No. 26—Schedule XXVI.  
 Form No. 27—Schedule XXVII.  
 Form No. 28—Schedule XXVIII.  
 Form No. 29—Schedule XXIX.  
 Form No. 30—Schedule XXX.  
 Form No. 31—Schedule XXXI.  
 Form No. 32—Schedule XXXII.  
 Form No. 33—Schedule XXXIII.  
 Form No. 34—Schedule XXXIV.  
 Form No. 35—Schedule XXXV.  
 Form No. 36—Schedule XXXVI.  
 Form No. 37—Schedule XXXVII.  
 Form No. 38—Schedule XXXVIII.  
 Form No. 39—Schedule XXXIX.  
 Form No. 40—Schedule XL.  
 Form No. 41—Schedule XLI.  
 Form No. 42—Schedule XLII.  
 Form No. 43—Schedule XLIII.  
 Form No. 44—Schedule XLIV.  
 Form No. 45—Schedule XLV.  
 Form No. 46—Schedule XLVI.  
 Form No. 47—Schedule XLVII.  
 Form No. 48—Schedule XLVIII.  
 Form No. 49—Schedule XLIX.  
 Form No. 50—Schedule L.  
 Form No. 51—Schedule LI.  
 Form No. 52—Schedule LII.  
 Form No. 53—Schedule LIII.  
 Form No. 54—Schedule LIV.  
 Form No. 55—Schedule LV.  
 Form No. 56—Schedule LVI.  
 Form No. 57—Schedule LVII.  
 Form No. 58—Schedule LVIII.  
 Form No. 59—Schedule LIX.  
 Form No. 60—Schedule LX.  
 Form No. 61—Schedule LXI.  
 Form No. 62—Schedule LXII.  
 Form No. 63—Schedule LXIII.  
 Form No. 64—Schedule LXIV.  
 Form No. 65—Schedule LXV.  
 Form No. 66—Schedule LXVI.  
 Form No. 67—Schedule LXVII.  
 Form No. 68—Schedule LXVIII.  
 Form No. 69—Schedule LXIX.  
 Form No. 70—Schedule LXX.  
 Form No. 71—Schedule LXXI.  
 Form No. 72—Schedule LXXII.  
 Form No. 73—Schedule LXXIII.  
 Form No. 74—Schedule LXXIV.  
 Form No. 75—Schedule LXXV.  
 Form No. 76—Schedule LXXVI.  
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 Form No. 85—Schedule LXXXV.  
 Form No. 86—Schedule LXXXVI.  
 Form No. 87—Schedule LXXXVII.  
 Form No. 88—Schedule LXXXVIII.  
 Form No. 89—Schedule LXXXIX.  
 Form No. 90—Schedule LXXXX.  
 Form No. 91—Schedule LXXXXI.  
 Form No. 92—Schedule LXXXXII.  
 Form No. 93—Schedule LXXXXIII.  
 Form No. 94—Schedule LXXXXIV.  
 Form No. 95—Schedule LXXXXV.  
 Form No. 96—Schedule LXXXXVI.  
 Form No. 97—Schedule LXXXXVII.  
 Form No. 98—Schedule LXXXXVIII.  
 Form No. 99—Schedule LXXXXIX.  
 Form No. 100—Schedule LXXXXX.



“Colonial White Mater Privilege”



Evaluate source record about Columbus Knox

Look at this record and see if it really is about Columbus Knox. If it is, save it to him/her in your tree.

PERSON IN YOUR TREE
Name: Columbus Knox
Birth: unk
Death: unk

1880 United States Federal Census

Name: **Columbus Knox**  
 Home in 1880: **Cedar Creek, Lancaster, South Carolina**  
 Age: **29**  
 Estimated birth year: **abt 1851**  
 Birthplace: **South Carolina**  
 Relation to head-of-household: **Self (Head)**  
 Spouse's name: **Mary**  
 Father's birthplace: **South Carolina**  
 Mother's birthplace: **South Carolina**  
 Neighbors:  
 Occupation: **Farm Labour**  
 Marital Status: **Married**  
 Race: **Mulatto**  
 Gender: **Male**  
 Cannot read/write:  
 Blind:  
 Deaf and dumb:  
 Otherwise disabled:  
 Idiiotic or insane:  
 Household Members: 

Name	Age
Columbus Knox	29
<u>Mary Knox</u>	26
Rachel Knox	8
Samuel Knox	7
Albert Knox	4
Simon P. Knox	3
Carry Knox	1

Source Citation: Year: 1880; Census Place: Cedar Creek, Lancaster, South Carolina; Roll: T9\_1232; Family History Film: 1255232; Page: 260-4000; Enumeration District: 78.

Source Information:

Ancestry.com and The Church of Jesus Christ of Latter-day Saints. 1880 United States Federal Census [database on-line]. Provo, UT, USA: The Generations Network, Inc., 2005. 1880 U.S. Census Index provided by The Church of Jesus Christ of Latter-day Saints © Copyright 1999 Intellectual Reserve, Inc. All rights reserved. All use is subject to the limited use license and other terms and conditions applicable to this site. Original data: United States of America. Bureau of the Census. Tenth Census of the United States, 1880. Washington, D.C.: National Archives and Records Administration, 1880. T9. 1,454 rolls

Description:

This database is an index to 50 million individuals enumerated in the 1880 United States Federal Census. Census takers recorded many details including each person's name, address, occupation, relationship to the head of household, race, sex, age at last birthday, marital status, place of birth, parents' place of birth. Additionally, the names of those listed on the population schedule are linked to actual images of the 1880 Federal Census. [Learn more...](#)

1. Name of the person or entity of which the business is conducted in whole or in part.		2. The name of each partner or other holder of an interest in the business, and the date of the acquisition of such interest.		3. The nature of the business.		4. The residence of each partner or other holder of an interest in the business, and the date of the acquisition of such interest.		5. The date of the filing of this statement.		6. The date of the filing of the last statement.		7. The date of the filing of the next statement.		8. The date of the filing of the next statement.		9. The date of the filing of the next statement.		10. The date of the filing of the next statement.		11. The date of the filing of the next statement.		12. The date of the filing of the next statement.		
261	267	James	Mar 18	son																				
		Ballie	Mar 23	daughter																				
262	268	Wm. C. Harrison	Mar 25			John L. Harrison																		
		Henry	Mar 26	wife		William Harrison																		
		Richard	Mar 28	daughter		William Harrison																		
		Reynold	Mar 28	son		William Harrison																		
		Robert	Mar 29	son																				
		William	Mar 29	son																				
		George	Mar 31	daughter																				
263	269	Wm. C. Harrison	Mar 31			Wm. C. Harrison																		
266	270	Wm. C. Harrison	Mar 31			Wm. C. Harrison																		
		Wm. C. Harrison	Mar 31			Wm. C. Harrison																		

“Colonial White Mater Privilege”

ancestry



1920 United States Federal Census

Name: **Mortimer Hawkins**  
Home in 1920: **Brandywine, Prince Georges, Maryland**  
Age: **36 years**  
Estimated birth year: **abt 1884**  
Birthplace: **Maryland**  
Relation to Head of House: **Head**  
Spouse's name: **Margaret E**  
Father's Birth Place: **Maryland**  
Mother's Birth Place: **Maryland**  
Marital Status: **Married**  
Race: **Black**  
Sex: **Male**  
Home owned: **Own**  
Able to read: **Yes**  
Able to Write: **Yes**  
Image: **646**

Neighbors:

Houshold Members:	Name	Age
	Mortimer Hawkins	36
	Margaret E Hawkins	35
	Evelyn B Hawkins	13
	Alice L Hawkins	11
	Wannie B Hawkins	7
	Preston M Hawkins	5
	Adelaide Hawkins	2
	Thelma E Hawkins	4/12

**Source Citation:** Year: 1920; Census Place: *Brandywine, Prince Georges, Maryland*; Roll: T625\_674; Page: 11B; Enumeration District: 84; Image: 646.

**Source Information:**

Ancestry.com. *1920 United States Federal Census* [database on-line]. Provo, UT, USA: The Generations Network, Inc., 2005. For details on the contents of the film numbers, visit the following NARA web page: NARA.

Note: Enumeration Districts 819-839 on roll 323 (Chicago City, Original data: United States of America, Bureau of the Census. *Fourteenth Census of the United States, 1920*. Washington, D.C.: National Archives and Records Administration, 1920, T625, 2,076 rolls.

**Description:**

This database is an index to individuals enumerated in the 1920 United States Federal Census, the Fourteenth Census of the United States. It includes all states and territories, as well as Military and Naval Forces, the Virgin Islands, Puerto Rico, American Samoa, Guam, and the Panama Canal Zone. The census provides many details about individuals and families including: name, gender, age, birthplace, year of immigration, mother tongue, and parents' birthplaces. In addition, the names of those listed on the population schedule are linked to actual images of the 1920 Federal Census. Learn more...

|||||||  
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STATE: Maryland DEPARTMENT OF COMMERCE—BUREAU OF THE CENSUS 1910-4710 SUPERVISOR  
 COUNTY: Prince Georges FOURTEENTH CENSUS OF THE UNITED STATES: 1920—POPULATION 1000-4710 LENDINER  
 TOWNSHIP OR OTHER DIVISION OF COUNTY: Prince Georges Unit 111 NAME OF INCORPORATED PLACE: \_\_\_\_\_  
 NAME OF INSTITUTION: \_\_\_\_\_ ENUMERATED BY ME ON THE 12<sup>th</sup> DAY OF Feb, 1920, at \_\_\_\_\_

PLACE OF BIRTH	NAME	RELATION	SEX	RACE	CITIZENSHIP	EDUCATION	NATIVITY AND MOTHER TONGUE						
							Foreign-born	Foreign-born	Foreign-born	Foreign-born			
1	2	3	4	5	6	7	8	9	10	11	12	13	14
81	Walter George W. Wood	Head	M	W	1852	High School	Maryland	Maryland	Maryland	Maryland			
82	Elizabeth W. Wood	Wife	F	W	1857	High School	Maryland	Maryland	Maryland	Maryland			
83	William R. Wood	Son	M	W	1912	High School	Maryland	Maryland	Maryland	Maryland			
84	William R. Wood	Son	M	W	1914	High School	Maryland	Maryland	Maryland	Maryland			
85	Thomas Wood	Son	M	W	1917	High School	Maryland	Maryland	Maryland	Maryland			
86	Thomas Wood	Son	M	W	1918	High School	Maryland	Maryland	Maryland	Maryland			
87	Thomas Wood	Son	M	W	1919	High School	Maryland	Maryland	Maryland	Maryland			
88	Thomas Wood	Son	M	W	1920	High School	Maryland	Maryland	Maryland	Maryland			
89	William R. Wood	Son	M	W	1912	High School	Maryland	Maryland	Maryland	Maryland			
90	William R. Wood	Son	M	W	1914	High School	Maryland	Maryland	Maryland	Maryland			

91	William R. Wood	Son	M	W	1916	High School	Maryland	Maryland	Maryland	Maryland			
92	William R. Wood	Son	M	W	1918	High School	Maryland	Maryland	Maryland	Maryland			
93	William R. Wood	Son	M	W	1920	High School	Maryland	Maryland	Maryland	Maryland			
94	William R. Wood	Son	M	W	1912	High School	Maryland	Maryland	Maryland	Maryland			
95	William R. Wood	Son	M	W	1914	High School	Maryland	Maryland	Maryland	Maryland			
96	William R. Wood	Son	M	W	1916	High School	Maryland	Maryland	Maryland	Maryland			
97	William R. Wood	Son	M	W	1918	High School	Maryland	Maryland	Maryland	Maryland			
98	William R. Wood	Son	M	W	1920	High School	Maryland	Maryland	Maryland	Maryland			
99	William R. Wood	Son	M	W	1912	High School	Maryland	Maryland	Maryland	Maryland			
100	William R. Wood	Son	M	W	1914	High School	Maryland	Maryland	Maryland	Maryland			

"Colonial White Mater Privilege"

## U.S. WORLD WAR II DRAFT REGISTRATION CARDS, 1942 RECORD FOR MORTIMER G HAWKINS

**REGISTRATION CARD—(Men born on or after April 28, 1877 and on or before February 16, 1897)**

SERIAL NUMBER U. 892	1. NAME (Print) Mortimer G. Hawkins	ORDER NUMBER
2. PLACE OF RESIDENCE (Print) Brandywine Pr. Gees Md. <small>(Number and street) (Town, township, village, or city) (County) (State)</small>		
<small>(THE PLACE OF RESIDENCE GIVEN ON THE LINE ABOVE WILL DETERMINE LOCAL BOARD JURISDICTION; LINE 1 OF REGISTRATION CERTIFICATE WILL BE IDENTICAL)</small>		
3. MAILING ADDRESS Brandywine, Md.		
4. TELEPHONE	5. AGE IN YEARS 59 yrs	6. PLACE OF BIRTH Brandywine Md.
	DATE OF BIRTH Feb 22 1893	
7. NAME AND ADDRESS OF PERSON WHO WILL ALWAYS KNOW YOUR ADDRESS Eleanor Hawkins		
8. EMPLOYER'S NAME AND ADDRESS Self (farmer) Brandywine, Md.		
9. PLACE OF EMPLOYMENT OR BUSINESS Brandywine, Md. Pr. Gees		
<small>I AFFIRM THAT I HAVE VERIFIED ABOVE ANSWERS AND THAT THEY ARE TRUE.</small>		
D. H. R. Form 1 (Revised 4-1-42) (over)		10-7130 Mortimer G. Hawkins (Registered Signature)

**REGISTRAR'S REPORT**

DESCRIPTION OF REGISTRANT		COMPLEXION	
RACE	HEIGHT (Approx.)	WEIGHT (Approx.)	HAIR
White	5' 10 1/4"	160	Blonde
Negro			Red
Oriental			Brown
Indian			Black
Eurasian			Gray
			Bald
			Black

Other obvious physical characteristics that will aid in identification.  
*N.A.*

I certify that my answers are true; that the person registered has read or has had read to him the instructions on this report and that all of his answers of which I have knowledge are true, except as follows:

Registrar for Local Board: *Francis C. Jago*  
Date of registration: *Apr 27 1942*

Local Board No. 1  
Harford County

State Army LOCAL BOARD  
Sgt. Alvin M. ...

10-7130-1

Record Index

Source Information

**APPENDIX C**

**Direct Lineage Family Trees**

**\*Hawkins**

**(6 Generations)**

**\*Shorter**

**(12 Generations)**

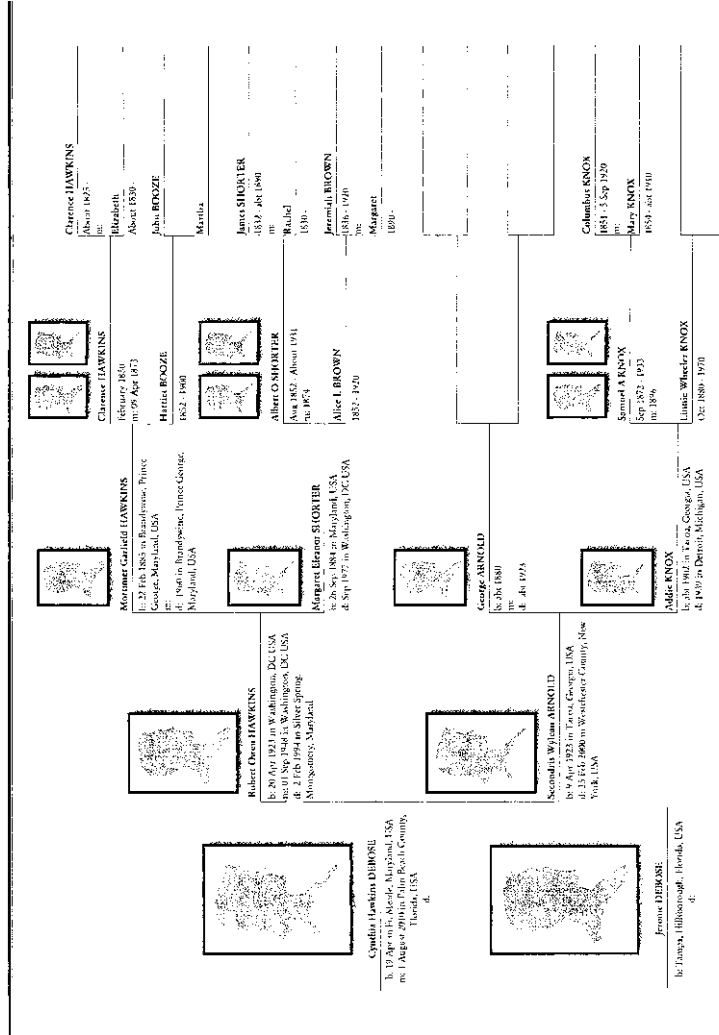
**\*Knox**

**(5 Generations)**

*“Colonial White Mater Privilege”*

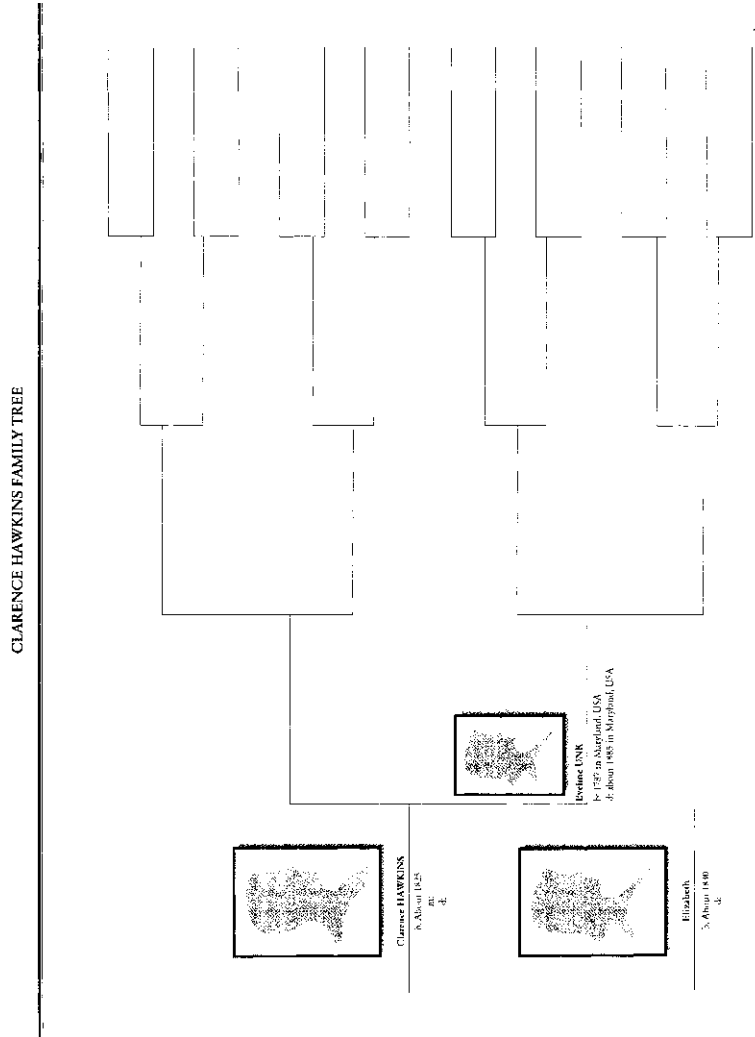
**Hawkins Family Tree  
(6 Generations)**

CYNTHIA HAWKINS DEBOSE FAMILY TREE





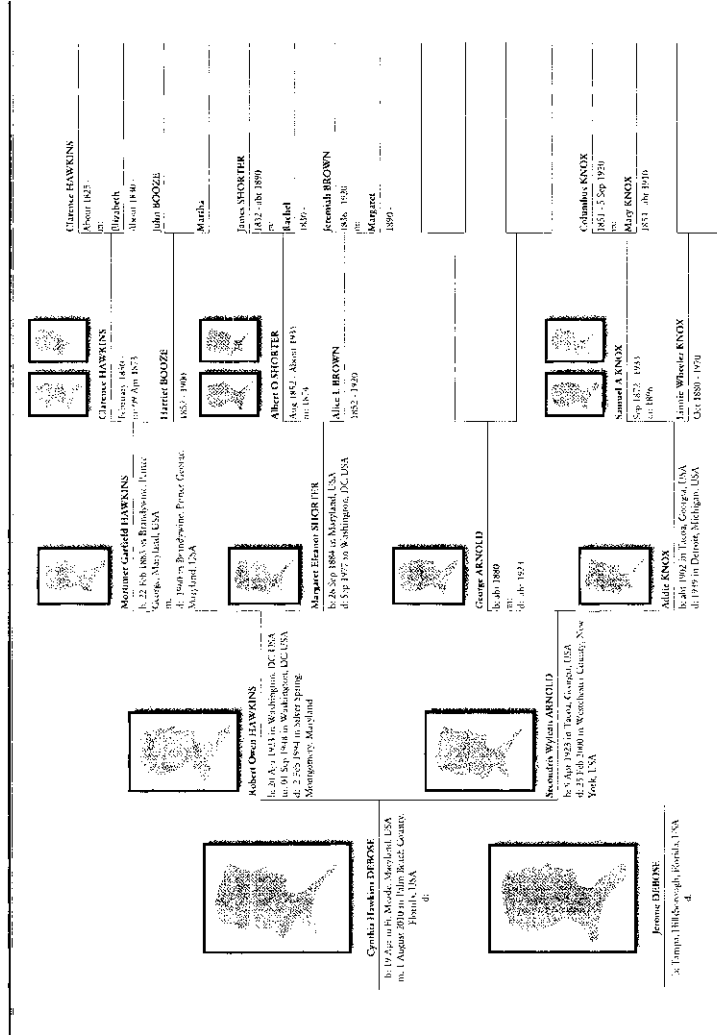
*“Colonial White Mater Privilege”*



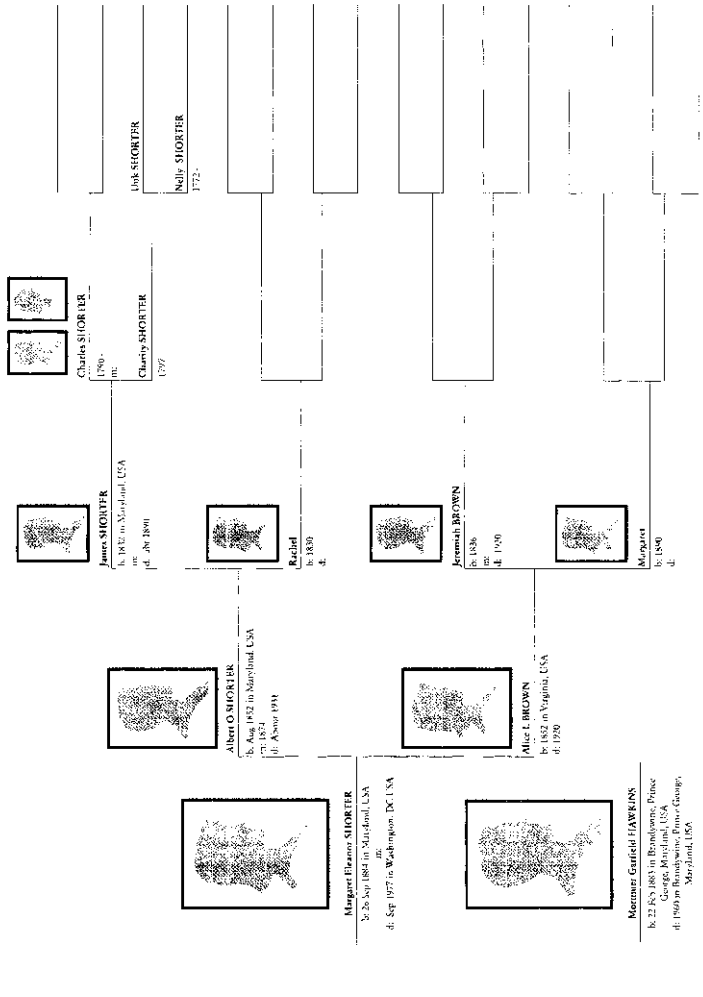
**Shorter Family Tree  
(12 Generations)**

“Colonial White Mater Privilege”

CYNTHIA HAWKINS DEBOSE FAMILY TREE

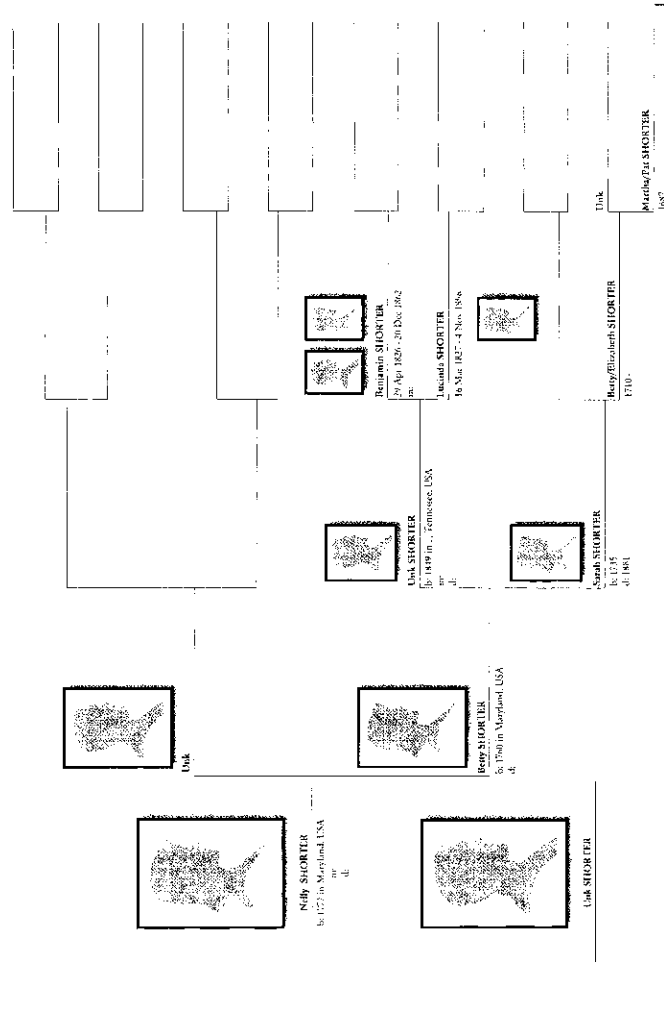


MARGARET ELEANOR SHORTER FAMILY TREE

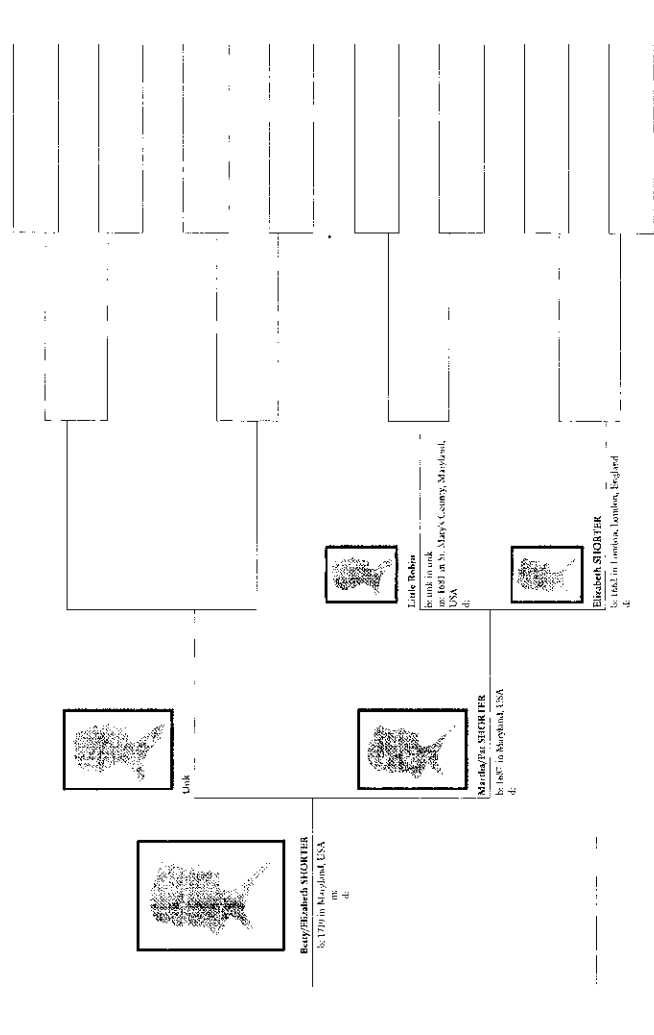


“Colonial White Mater Privilege”

NELLY SHORTER FAMILY TREE



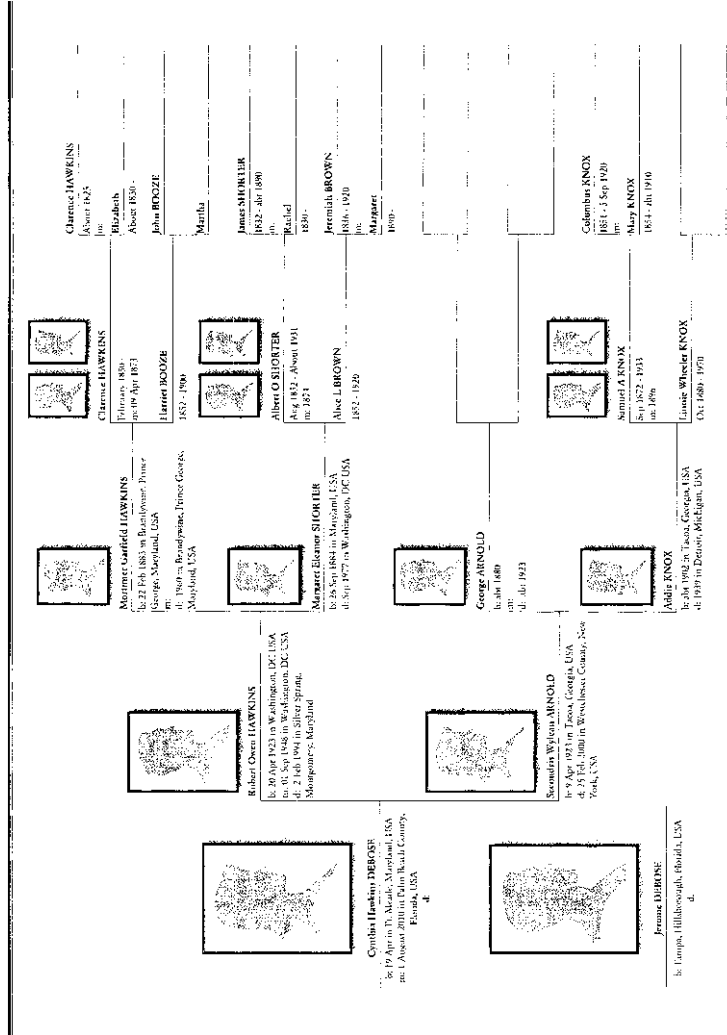
BETTY/ELIZABETH SHORTER FAMILY TREE



*“Colonial White Mater Privilege”*

**Knox Family Tree  
(5 Generations)**

CYNTHIA HAWKINS DEBOSE FAMILY TREE





# Ordinary People in an Extraordinary Time: The Black Middle-Class in the Age of Obama

LELAND WARE AND THEODORE J. DAVIS\*

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## INTRODUCTION

Conditions for African Americans are different and immeasurably better than they were before the enactment of the Civil Rights laws of the 1960s. At the present, it is almost difficult to imagine the extreme oppression African Americans endured under Jim Crow. In the southern states, schools, restaurants, hotels, theaters, and public

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\* Leland Ware, Louis L. Redding Professor of Law & Public Policy, University of Delaware and Theodore J. Davis, Jr. Ph.D., Associate Professor of Political Science and International Relations, University of Delaware.

transportation were segregated. The separation included elevators, parks, public restrooms, hospitals, drinking fountains, prisons, and places of worship.<sup>1</sup> Whites and blacks were born in separate hospitals, educated in segregated schools, and buried in separate graveyards.<sup>2</sup> Blacks were not allowed to vote in elections.<sup>3</sup> There were, in effect, two criminal justice systems: one for whites and another for blacks.<sup>4</sup> The system was codified in state and local laws and enforced by intimidation and violence.<sup>5</sup> When the color line was breached, violence was unleashed against offenders by the Ku Klux Klan and local whites, often in concert with local law enforcement officials.<sup>6</sup> Lynching and other forms of violence and intimidation were routine.<sup>7</sup> In the North and South, blacks lived in segregated neighborhoods and were relegated to the lowest paying, least desirable occupations.<sup>8</sup>

During the segregation era, however, a small black-middle-class managed to prosper. The roots of this group can be traced back to the antebellum period. Prior to the Civil War, there were house and field slaves in the South and free blacks in the North.<sup>9</sup> The house slaves occupied a higher status and, in many cases, were the mixed-race offspring of slave owners.<sup>10</sup> During the Reconstruction Era and into the early decades of the twentieth century, this mixed-race “aristocracy” occupied the top rungs of the social hierarchy.<sup>11</sup> After World War I, as southern blacks migrated to urban industrial centers, a new middle-class emerged.<sup>12</sup> This group consisted of small entrepreneurs, educated professionals, and clerical sales workers. Black businesses con-

---

1. See TAYLOR BRANCH, PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63, at 49 (1989); JOHN HOPE FRANKLIN & ALFRED A. MOSS JR., FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS 290-91, 349 (2000).

2. See GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 605-39 (1944).

3. FRANKLIN & MOSS, *supra* note 1, at 281-86.

4. See MYRDAL, *supra* note 2, at 547-55.

5. LEON F. LITWACK, TROUBLE IN MIND: BLACK SOUTHERNERS IN THE AGE OF JIM CROW 271-79 (1999).

6. See FRANKLIN & MOSS, *supra* note 1, 345-50.

7. See LITWACK, *supra* note 5, at 285-87.

8. See MYRDAL, *supra* note 2, at 397-409.

9. See generally W.E.B. DU BOIS, THE PHILADELPHIA NEGRO: A SOCIAL STUDY (Oxford Univ. Press 2007) (1899); E. FRANKLIN FRAZIER, BLACK BOURGEOISIE: THE RISE OF A NEW MIDDLE CLASS (1957); MYRDAL, *supra* note 2.

10. See ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY 30 (2008).

11. Mary Patillo McCoy, *Middle Class Yet Black: A Review Essay*, 5 AFR. AM. RES. PERSPECTIVES 25-38 (1999), available at [www.rcgd.isr.umich.edu/prba/prespectives/fall1999/mpatillo.pdf](http://www.rcgd.isr.umich.edu/prba/prespectives/fall1999/mpatillo.pdf).

12. *Id.*

*Ordinary People in an Extraordinary Time*

sisted of barber shops and beauty parlors, dry cleaners, restaurants, grocery stores, and the like.<sup>13</sup> Physicians and dentists occupied a high social status as did other blacks with college degrees.<sup>14</sup> After World War II, the middle-class expanded slowly as blacks in the North found work in unionized occupations that paid better than what they could otherwise have earned.<sup>15</sup>

In the decades that followed the enactment of the Civil Rights laws, the black middle-class has grown rapidly. Levels of educational attainment are higher. Employment opportunities are greater. Family incomes are higher.<sup>16</sup> Over the last twenty years, more African American families have moved to suburban communities than those who headed north during the great migration.<sup>17</sup> The election of Barack Obama as President in 2008 signaled an unprecedented advance in race relations in America. Some heralded it as the beginning of a post-racial era.<sup>18</sup>

As we enter the second decade of the 21st Century, an examination of the status of African American families reveals a mixed picture; the best of times for some, the worst of times for others. For those in a position to take advantage of the opportunities created by the Civil Rights revolution, the gains over the last generation have been remarkable. For those left behind in America's impoverished communities, the obstacles to advancement are more daunting today than they were a generation ago. They continue to be plagued by the many issues arising from poverty and residential segregation.

Conditions are only marginally better for lower-middle-class African Americans. For this group, wealth building has been difficult, and the current recession halted many of the gains that had previously been made. Middle-class blacks earn less than their white counterparts. Their average net worth is much lower than middle-class whites. African Americans have moved to suburban communities, but many reside in areas that are less affluent than white middle-class communities. All homeowners have been hammered by housing crisis, but black homeowners have fared far worse than whites.<sup>19</sup>

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13. *Id.*

14. *Id.*

15. *Id.*

16. *See infra* pp. 15-20.

17. *See infra* pp. 34-35.

18. MICHAEL TESLER & DAVID O. SEARS, OBAMA'S RACE AND THE DREAM OF A POST RACIAL AMERICA 1-5 (2010).

19. *See infra* p. 44.

This Article will evaluate the progress and current conditions of middle-class African American families, a group that has received far less academic attention than low-income families. Part I discusses the diversity in attitudes among African Americans along class lines explaining that they are not a homogenous group. Blacks are increasingly becoming geographically dispersed with different interests, competing claims, and little reason to identify with one another. Part II shows the substantial gains in educational attainment levels among blacks that have occurred since 1970. The next section delineates the advancement in occupational attainment levels over the last forty years. Part III shows that black family incomes have risen steadily since 1970. Part IV shows that the gains have not been evenly distributed; there are significant income disparities among blacks.

The next section examines the history and continuing problems caused by residential segregation. Until the late 1960s, the real estate industry, backed by the federal government, did everything it could to keep blacks out of suburban communities leaving a legacy that continues to haunt us.<sup>20</sup> Parts VI and VII show that while integration has increased, levels of residential segregation remain high, especially in the “ghetto belt” located in Northeast and Midwest.<sup>21</sup> Parts VIII and IX examine the movement of black families to suburban communities and, in some cases, electing to reside in all-black, upscale suburban neighborhoods. The final section shows how the housing crisis and the economic recession have had a devastating effect on the black middle-class.

## I. ATTITUDES OF BLACK AMERICANS: DIVIDING BY CLASS

Over the last twenty-five years, African Americans have been slowly dividing into three socioeconomic groups: one that is low-income, another with modest means, and a growing segment that is very affluent. Divisions in the attitudes and values of African Americans are growing along class lines. These divisions were highlighted in a 2007 survey conducted by the Pew Research Center, *Blacks See*

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20. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 148-85 (1993).

21. JOHN R. LOGAN & BRIAN J. STULTS, THE PERSISTENCE OF SEGREGATION IN THE METROPOLIS: NEW FINDINGS FROM THE 2010 CENSUS 9-10 (2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report2.pdf>.

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*Growing Values Gap Between Poor and Middle-class.*<sup>22</sup> The researchers documented the attitudes of African Americans on a range of issues.<sup>23</sup> By a ratio of two-to-one, the respondents said the values of poor and middle-class blacks had grown more dissimilar over the past decade.<sup>24</sup> Twenty-three percent of the respondents said middle-class and poor blacks share a lot of values in common.<sup>25</sup> 42% said they had some values in common; 22% said they share only a little in common, and 9% said they shared almost no values.<sup>26</sup> On the question of racial identity a significant minority, 37% said that blacks should no longer be seen as a single race.<sup>27</sup> Only a slim majority, 53%, reported that it is still appropriate to view blacks as single race.<sup>28</sup>

The diversity among African Americans' attitudes toward interaction with whites is illustrated in Professor Elijah Anderson's book, *The Cosmopolitan Canopy*.<sup>29</sup> Anderson explained how individuals with different racial, gender, and ethnic backgrounds interact in public spaces.<sup>30</sup> In the course of his analysis, Anderson describes the orientations of two groups of African Americans: ethnocentrics and cosmopolitans.<sup>31</sup> Ethnocentrics view cross-racial contacts with deep suspicion.<sup>32</sup> They consider most whites to be racist and remain vigilant for evidence of racial slights and other forms of discrimination.<sup>33</sup> Ethnocentrics are defined by loyalty to their own group.<sup>34</sup> They do not socialize with whites.<sup>35</sup> Their attitudes are associated with working and lower-class blacks and are produced by years of social isolation in segregated neighborhoods.<sup>36</sup>

Blacks with a cosmopolitan perspective tend to be more educated than ethnocentrics.<sup>37</sup> They are usually middle to upper-middle-class.<sup>38</sup>

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22. OPTIMISM ABOUT BLACK PROGRESS DECLINES: BLACKS SEE GROWING VALUES GAP BETWEEN POOR AND MIDDLE CLASS, PEW RESEARCH CENTER (2007), available at <http://pewsocialtrends.org/files/2010/10/Race-2007.pdf>.

23. *Id.* at i.

24. *Id.* at 3-4.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. ELIJAH ANDERSON, *THE COSMOPOLITAN CANOPY: RACE AND CIVILITY IN EVERYDAY LIFE* 152-53 (2011).

30. *Id.* at 155.

31. *Id.* at 189-98.

32. *Id.* at 190-91.

33. *Id.*

34. *Id.* at 189.

35. *Id.* at 193.

36. *Id.* at 190.

37. *Id.* at 194.

Cosmopolitans are more generous in their interpretations of the actions of whites and acknowledge the progress made in race relations.<sup>39</sup> They are more accepting of people who are different from themselves.<sup>40</sup> They are willing to give whites the benefit of the doubt in their interactions with them.<sup>41</sup> They tend to live in integrated neighborhoods and socialize comfortably in black and white circles.<sup>42</sup>

In a commentary on the differences among blacks, *Disintegration: The Splintering of Black America*,<sup>43</sup> Eugene Robinson divided African Americans into four subgroups. One group is the “Transcendent Elite,” a small group of African Americans that reside in a world of wealth, power and influence.<sup>44</sup> Examples of this group include the Obamas, Oprah Winfrey, Beyoncé, Kobe Bryant, and Vernon Jordan.<sup>45</sup> Another group, the “Mainstream Middle-class,” represents the majority of black Americans who own their homes, are gainfully employed in a range of occupations, and live what some might consider the American Dream.<sup>46</sup> There is another group, “The Emergents,” consisting of mixed-race families and recent immigrants from Africa and the Caribbean.<sup>47</sup> Finally, there is “The Abandoned,” a large and growing underclass of impoverished, racially isolated families concentrated in America’s inner cities.<sup>48</sup> These four groups are geographically dispersed.<sup>49</sup> They have different interests, competing claims, and little reason to identify with one another.<sup>50</sup>

Today’s black middle-class occupies an awkward position between poor and working class blacks and the white middle-class.<sup>51</sup> Upper-middle-class African Americans’ material success sets them apart from the rest of the black community. They can be recognized by their bearing, grooming, and dress. They purchase the best they

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38. *Id.*

39. *Id.* at 195.

40. *Id.*

41. *Id.*

42. *Id.* at 196.

43. EUGENE ROBINSON, *DISINTEGRATION: THE SPLINTERING OF BLACK AMERICA* 5-6 (2010).

44. *Id.* at 139-43.

45. *Id.*

46. *Id.* at 77-79.

47. *Id.* at 5.

48. *Id.* at 5-7.

49. *Id.* at 5-6.

50. *Id.*

51. See ANDERSON, *supra* note 29, 227-29; see also Gloria Goodale, *Black Middle Class Comes into View*, CHRISTIAN SCI. MONITOR, Oct. 31, 2008, at 13.

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can afford in homes, cars, clothes, and furnishings.<sup>52</sup> The vast majority of this group takes pains to present themselves as respectable individuals. They maintain cultural and class distinction between themselves and other blacks although they occasionally visit the “hood” to purchase soul food or to visit an acquaintance.<sup>53</sup>

Middle-class blacks take careful note of welcome signs in integrated social settings.<sup>54</sup> They gravitate to restaurants and nightclubs where upscale blacks tend to congregate to relieve the stress they experience at work and in other integrated settings.<sup>55</sup> They work hard to avoid being confused with their lower-class counterparts.<sup>56</sup> Middle-class blacks are aware of how society views poorer members of their race, and they privately share some of those sentiments.<sup>57</sup> Unlike the urban underclass, the black middle-class lives in a world filled with options.<sup>58</sup> They are not restricted in the ways their forbears were by segregation.<sup>59</sup> They are members of not just a race, but also an affluent, economic class.<sup>60</sup> This Article is focused largely on the conditions of the group Robinson identified as the “Mainstream Middle-class,” the group with incomes above the poverty and working poor levels and below levels of the wealthy entertainers, athletes and entrepreneurs that constitute the Transcendent Elite.

## II. EDUCATIONAL ATTAINMENT LEVELS

Defining the middle-class has never been an easy task for social scientists. Over the years, scholars have used education,<sup>61</sup> occupation,<sup>62</sup> income,<sup>63</sup> and home ownership as the primary measures of so-

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52. ANDERSON, *supra* note 29, at 228.

53. *Id.* at 230.

54. *Id.* at 229.

55. *Id.* at 229-30.

56. *Id.* at 231.

57. *Id.* at 228.

58. *Id.* at 230.

59. *Id.*

60. *Id.* at 231.

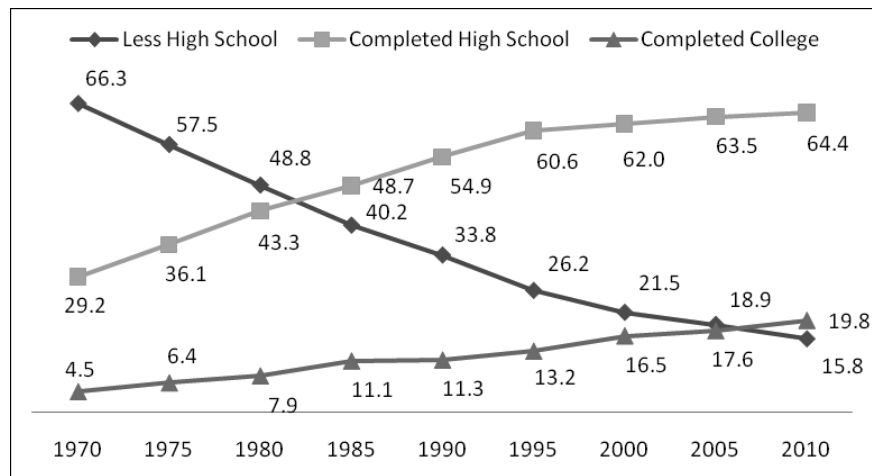
61. See Harriett P. McAdoo, *Factors Related to Stability in Upwardly Mobile Black Families* J. MARRIAGE & FAM., Nov. 1978, at 767-68; see also BENJAMIN P. BOWSER, *THE BLACK MIDDLE CLASS: SOCIAL MOBILITY AND VULNERABILITY* 113-15 (2007).

62. See generally FRAZIER, *supra* note 9; BART LANDRY, *THE NEW BLACK MIDDLE CLASS* (1987); WILLIAM JULIUS WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* (1978).

63. Sharon Collins, *The Making of the Black Middle Class*, 30 SOCIAL PROBLEMS 369, 374-77 (1983).

cioeconomic stratification.<sup>64</sup> The advances in African Americans' educational attainment levels since World War II have been significant. In 1940, the vast majority of blacks (92.3%) had completed less than 4 years of high school.<sup>65</sup> Only 6.4% had completed high school and 1.3% of the black population had completed four or more years of college.<sup>66</sup> As shown in Graph 1, by 1970, the proportion of blacks 25 years and older with less than 12 years of school had declined by 26%.<sup>67</sup>

**Graph 1**  
**Educational Attainment Levels of Blacks**  
**25 Years and Older: 1970-2010**



Source: U.S. CENSUS BUREAU, % OF PEOPLE 25 YEARS AND OVER WHO HAVE COMPLETED HIGH SCHOOL OR COLLEGE, BY RACE, HISPANIC ORIGIN AND SEX: SELECTED YEARS 1940 TO 2010, tbl. A-2 (2010), <http://www.census.gov/hhes/socdemo/education/data/cps/historical/index.html>.

By 2010, the percentage of blacks (25 years and older) with less than 12 years of school had declined to 15.8% from a high of 66.3% in

64. See generally MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY (1995).

65. U.S. Census Bureau, % of People 25 Years and Over Who Have Completed High School or College, by Race, Hispanic Origin and Sex: Selected Years 1940 to 2010, tbl.A-2 (last revised Feb. 23, 2012), <http://www.census.gov/hhes/socdemo/education/data/cps/historical/index.html> [hereinafter Table A-2].

66. *Id.*

67. *Id.*



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1970.<sup>68</sup> It is not surprising that the decades with the largest decline in the proportion of blacks with less than 12 years of school were the 1970s (dropping by 17.5%) followed by the 1980s (declining by 15%).<sup>69</sup> The 20 year decline between 1970 and 1990 was 32.5% compared to only 18% between 1990 and 2010.<sup>70</sup> Despite the decline, in 2010, the percentage of blacks with less than 12 years of school was still relatively high at 15.8% when compared to 7.9% for non-Hispanic whites.<sup>71</sup> The proportion of blacks in the moderate education group (4 years of high school and some college) rose from 29.2% in 1970 to 64.4% in 2010.<sup>72</sup> The largest increase in this group occurred between 1970 and 1995, increasing by 31.4 percentage points.<sup>73</sup> Since 1995, the proportion of blacks with 4 years of high school and some college has increased by only 3.8%.<sup>74</sup>

Among black high school graduates in 1970, only 4.5% had 16 or more years of education.<sup>75</sup> However, during the 1970s, many young African Americans took advantage of new opportunities consisting of governmental grants, low-interest education loans, and increased scholarship opportunities from institutions of higher learning, anxious to recruit black students.<sup>76</sup> By 1980, the proportion of college educated African Americans had increased to 7.9%. During the 1980s, the growth in the proportion of the black population with 16 or more years of education equaled the advances that occurred of 3.4% during the 1970s.<sup>77</sup> By 1990, the proportion of blacks with 16 or more years of schooling had increased to 11.3%.<sup>78</sup> The largest increase in the proportion of blacks with 4 or more years of college occurred during the 1990s when the proportion of blacks with 16 or more years of education grew by 5.3 percentage points to 16.5%.<sup>79</sup> Although the propor-

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68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. See generally JAMES BLACKWELL, *MAINSTREAMING OUTSIDERS: THE PRODUCTION OF BLACK PROFESSIONALS* (1987).

77. See Table A-2, *supra* note 65; U.S. CENSUS BUREAU, *CENSUS OF POPULATION AND HOUSING: 1940 CENSUS*, available at <http://www.census.gov/prod/www/abs/decennial/1940.html> [hereinafter 1940 CENSUS]; U.S. CENSUS BUREAU, *CENSUS OF POPULATION AND HOUSING: 1950 CENSUS*, available at <http://www.census.gov/prod/www/abs/decennial/1950.html> [hereinafter 1950 CENSUS].

78. Table A-2, *supra* note 65

79. *Id.*

tion of black college graduates continued to increase during the 2000s, the growth rate of 3.3% was slightly lower than it was in earlier decades.<sup>80</sup>

Despite what appears to be a leveling off of blacks' educational attainment during the 2000s, there are two things worth noting. First, blacks experienced a significant increase in their educational attainment levels during the 40-year period between 1970 and 2010.<sup>81</sup> This is especially significant since educational attainment is a key contributor to the rise in and indicator of the size of new black middle-class. Second, despite improvements in blacks' educational attainment, they still lagged behind whites.<sup>82</sup> For example, in 2010, the gap between black and white college graduates was 13.4%.<sup>83</sup>

### III. OCCUPATIONAL ADVANCES

During the first half of the twentieth century, blacks abandoned the fields of the agrarian South and found employment in factories in the industrializing North and Midwest. As the discussion in this section shows, over the last 40 years, jobs have moved from factory floors to retail outlets and office suites.<sup>84</sup> In 2010, 29% of employed blacks were employed in management, professional, or related occupations.<sup>85</sup> An additional 25% were employed in sales or office occupations.<sup>86</sup> Another 25% were employed in service occupations (such as food and beverage preparation, lodging, cosmetology, recreation, protection, personal services, etc.), and these occupations required modest educational attainment levels and afforded a moderate income.<sup>87</sup>

We divided black workers into white- and blue-collar categories based on the Standard Occupational Classification System used to or-

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80. *Id.*

81. *Id.*

82. The interpretation is based on data from the U.S. Census Bureau. *See* Table A-2, *supra* note 65.

83. *Id.*

84. Arlene Dohm & Lyn Shniper, *Employment Outlook: 2006-2017*, MONTHLY LABOR REV., Nov. 2007, at 86-125, available at, [www.bls.gov/opub/mlr/2007/11/art5full.pdf](http://www.bls.gov/opub/mlr/2007/11/art5full.pdf).

85. U.S. BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES: EMPLOYED PERSONS BY OCCUPATIONS, RACE, HISPANIC OR LATINO ETHNICITY AND SEX 12-13, available at, <http://www.bls.gov/cps/cpsaat10.pdf> [hereinafter EMPLOYED PERSONS].

86. *Id.*

87. *Id.*

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ganize workers into occupational categories.<sup>88</sup> White-collar occupations are defined as those who administer, supervise, or perform work that come in part under these groups and usually include managerial, professional, technical, sales, clerical, and other administrative support positions.<sup>89</sup> White-collar occupations are knowledge based jobs involving little manual labor.<sup>90</sup> Approximately half of the black population is now employed in white collar jobs.<sup>91</sup> In 1972, only 34.8% of black workers were employed in white-collar occupations as shown in Graph 2.<sup>92</sup> By 2006, the proportion of blacks employed in white-collar positions had increased to 49.5%.<sup>93</sup> This was a 14.7% increase over the 34-year period.<sup>94</sup> During the decade of the 1970s, the proportion of blacks in white-collar positions only grew by 3.8%.<sup>95</sup> During the 1980s, the proportion of blacks employed in white-collar positions grew by 7.3%.<sup>96</sup> During the 1990s, it grew by 5.9%, but it declined by 2.3% from 2000 to 2006.<sup>97</sup>

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88. Chester Levine, Laurie Salmon & Daniel Weinberg, *Revising the Standard Occupational Classification System*, MONTHLY LABOR REV., May 1999, at 36, available at, <http://bls.gov/mlr/1999/05/art4full.pdf>.

89. U.S. OFFICE OF PERSONNEL MANAGEMENT, HANDBOOK OF OCCUPATIONAL GROUPS AND FAMILIES 18 (2009), available at <http://www.opm.gov/fedclass/gshbkocc.pdf>.

90. The perception is that white-collar workers work with their minds and blue-collar workers work with their hands. However, many blue-collar occupations require the ability to work with both the hands and the mind. Some blue-collar workers are very skilled individuals who, depending on their expertise, can command very high wages. Among this group of blue-collar occupations are craftspeople and precision, production, and repair workers. Other blue-collar occupations require fewer skills and usually include jobs such as operators, fabricators, private household and service workers, agriculture, fisherman, foresters, and other laborers. Blue-collar positions are less prestigious than white-collar positions even though many of these workers have higher skill levels and have higher incomes than some white-collar workers (especially lower white-collar workers). Blue-collar positions were once a plentiful, vital part of the labor force and a major source of employment for blacks. In recent years, mechanization and other technological advances have eliminated many of these jobs.

91. See EMPLOYED PERSONS, *supra* note 85. The data source used to examine changes in blacks' occupation classification was the 1972-2006 *General Social Surveys*.

92. See Graph 2, Changes in Occupations Classifications: 1972-2006.

93. *Id.*

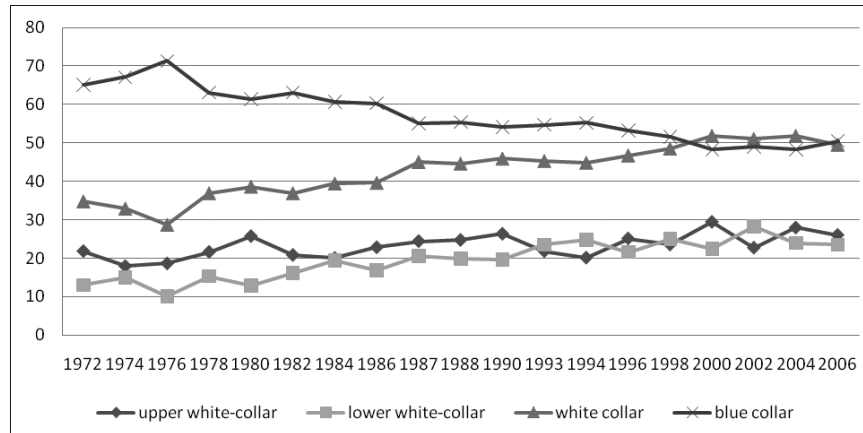
94. *Id.*

95. *Id.*

96. See *id.*

97. See *id.*

**Graph 2**  
**Changes in Occupational Classifications: 1972-2006**



Source: James A. Davis, Tom W. Smith, & Peter V. Marsden, General Social Surveys, 1972-2006, Roper Center for Public Opinion Research, University of Connecticut/Ann Arbor, MI: Inter-university Consortium for Political and Social Research (Apr. 12, 2009).

During the 1970s, the proportion of blacks employed in blue-collar occupations declined by 5%, and it further declined by 7.3 percentage points in the 1980s.<sup>98</sup> The largest decline in the proportion of blacks employed in blue-collar positions took place in the mid-to-late 1980s.<sup>99</sup> Between 1982 and 1990, the proportion of blacks employed in blue-collar occupations decreased from 63.1% to 54.1% (or 9 percentage points).<sup>100</sup> During the 1990s, it declined by 8 percentage points, however the decades of the 2000s witnessed a 3% increase in the number of blacks employed in blue-collar occupations.<sup>101</sup> Since 2000, the proportion of blacks employed in blue-collar and white-collar positions has been approximately fifty/fifty.<sup>102</sup>

Changes in African American occupational characteristics can be seen from another perspective when white-collar classifications are divided into upper and lower categories.<sup>103</sup> In 1972, 34.8% of all em-

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. Upper white-collar workers included those employed in professional or managerial positions, while lower white-collar workers included those employed in technical, sales, clerical, and other administrative support jobs.

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ployed blacks were in white collar occupations.<sup>104</sup> By 2006, the figure had risen to 49.5%.<sup>105</sup> In 1972, 21.8 % of all employed blacks worked in upper white-collar occupations with 13% in lower-white collar occupations as shown in Graph 2.<sup>106</sup> In 2006, approximately 26% of all black, white-collar workers were employed in upper white-collar occupations.<sup>107</sup> The proportion of blacks employed in lower, white-collar occupations increased since 1972 from 13% to 23.5 in 2006.<sup>108</sup> The proportion of blacks in upper- and lower-white-collar occupations has declined since 2000.<sup>109</sup> The proportion of African Americans in lower-white-collar occupations declined from a high of 28.2% in 2002 to 23.5% in 2006.<sup>110</sup> The proportion of blacks in upper-white-collar occupations declined from a high of 29.4% in 2000 to 26% in 2006.<sup>111</sup>

Although blacks have made substantial advances in occupational classifications, they still lag behind whites in proportion to their population employed in white-collar occupations. In 1972, the difference in the proportion of blacks and whites employed in white-collar occupations was 22.5%.<sup>112</sup> By 2006, the difference was down to 12.9%.<sup>113</sup> The proportion of whites employed in white-collar occupations increased slightly from 57.3% in 1972 to 62.4% in 2006.<sup>114</sup> These significant changes have contributed to a rise in the size of the black middle-class. However, much of the change in blacks' occupational classifications can be attributed to the change in the nature of work since the 1970s. Agricultural and many of the lower-blue collar and manufacturing jobs have declined, and many blacks have been left unemployed,<sup>115</sup> underemployed,<sup>116</sup> or employed in lower level white-collar positions.<sup>117</sup>

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104. See EMPLOYED PERSONS, *supra* note 85, at 12-13.

105. See *id.*

106. See *id.*

107. See *id.*

108. See *id.*

109. See *id.*

110. See *id.*

111. See *id.*

112. See *id.*

113. See *id.*

114. See *id.*

115. See U.S. BUREAU OF LABOR STATISTICS, EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY RACE, SEX AND AGE tbl.A-2 (2010), available at [www.bls.gov/news.release/empst.t02.htm](http://www.bls.gov/news.release/empst.t02.htm) [hereinafter Table A-2].

116. See Andrea Orr, Commentary, *One in Four Black, Hispanic Workers Underemployed*, ECON. POL'Y INST. (Jan. 8, 2010), [http://www.epi.org/publication/one\\_in\\_four\\_black\\_hispanic\\_workers\\_is\\_underemployed/](http://www.epi.org/publication/one_in_four_black_hispanic_workers_is_underemployed/).

117. See Graph 2, *supra* p.13.

#### IV. FAMILY INCOME

The average family incomes of African Americans have increased significantly over the last 40 years.<sup>118</sup> Describing the economic status of the black middle-class in the 1950s, E. Franklin Frazier wrote:

In 1949, the median income of Negro families in the United States was \$1,665, or 51 percent of the median income of white families, which was \$3,232. Only 16 percent of the Negro families as compared to 55 percent of the white families had incomes of \$3,000 or more . . . . For the country as a whole, the incomes of members of the black bourgeoisie range from between \$2,000 and \$2,500 and upward. The majority of their incomes do not amount to as much as \$4,000. In fact, scarcely more than one percent of all the Negroes in the country have an income amounting to \$4,000 and only one-half of one percent of them has an income of \$5,000 or more.<sup>119</sup>

The data provides ample proof of a growing black middle-class after the late 1960s. For the purposes of this Article, black families were divided into three income groups based on constant 2009 dollars. For purposes of this study, the “lower-income group” consisted of families with incomes under \$49,999, which was \$10,089 less than or 83% of the national median. The “moderate-income group” consisted of families with annual incomes between \$50,000 and \$99,999. The “upper-income group” included families with annual incomes above \$100,000.

In 1970, the proportion of black families in the lower income category was 76%; by 2009, this had declined to 61% as shown in Graph 3.<sup>120</sup> Since 1970, the proportion of black families in the lower-income category has declined by an average of 5.3% per decade with the exception of the 2000s.<sup>121</sup> The greatest decline in the percent of blacks in the lower-income group occurred during the 1990s, when there was an 8% drop in the percent of blacks in the lower-income group.<sup>122</sup> Despite the overall decline in the percentage of blacks in the lower-income group since the 1970s, between 2000 and 2009, the proportion of blacks in the lower-income category increased by 3% points.<sup>123</sup>

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118. See U.S. CENSUS BUREAU, FAMILIES BY TOTAL MONEY INCOME, RACE, AND HISPANIC ORIGIN OF HOUSEHOLDER: 1967 TO 2009 tbl.F-23 (2010), available at [http://www.census.gov/hhes/www/income/data/historical/families/2010/F23\\_2010.xls](http://www.census.gov/hhes/www/income/data/historical/families/2010/F23_2010.xls) [hereinafter TABLE F-23].

119. E. FRANKLIN FRAZIER, BLACK BOURGEOISIE: THE RISE OF A NEW MIDDLE CLASS 50-51, 52 (Free Press Paperbacks 1997) (1957).

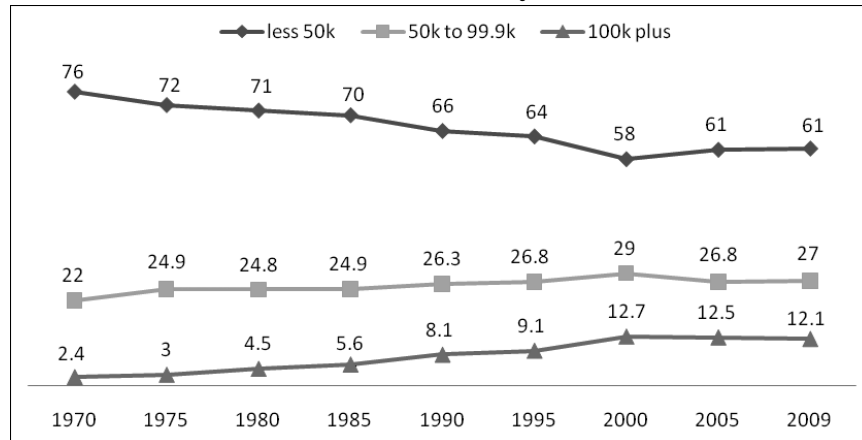
120. See Table F-23, *supra* note 118.

121. See *id.*

122. See *id.*

123. See *id.*

**Graph 3**  
**Distribution of Black Families by Income: 1970-2009**



Source: U.S. CENSUS BUREAU, FAMILIES BY TOTAL MONEY INCOME, RACE, AND HISPANIC ORIGIN OF HOUSEHOLDER: 1967 TO 2009 tbl. F-23 (2010), available at [http://www.census.gov/hhes/www/income/data/historical/families/2010/F23\\_2010.xls](http://www.census.gov/hhes/www/income/data/historical/families/2010/F23_2010.xls)

The change in the proportion of black families in the moderate-income category between 1970 and 2009 was not as great as the changes among black families in the lower- and upper-income groups. In 1970, only 22% of black families were in the moderate-income group.<sup>124</sup> By 2009, the proportion of families in the moderate-income group had increased to 27%.<sup>125</sup> Since 1970, the proportion of black families in the middle-income group increased by roughly 3 percent per decade.<sup>126</sup> However, since 2000, the proportion of black families in the moderate-income group declined by 2% from 29 to 27%.<sup>127</sup>

In 1970, only 2.4% of the black families were in the higher-income category.<sup>128</sup> By 2009, the proportion of black families in this category had increased to 12.1%.<sup>129</sup> The largest increase in the proportion of blacks in the upper income category occurred during the 1980s and 1990s. During the 1980s, the proportion of black families in the upper-income category rose by 3.6%.<sup>130</sup> Throughout the 1990s,

124. *See id.*  
125. *See id.*  
126. *See id.*  
127. *See id.*  
128. *See id.*  
129. *See id.*  
130. *See id.*

the percentage of blacks in the upper-income category rose by 4.6%.<sup>131</sup> However, the 2000s witnessed a decrease of 0.6% (or no significant change) in the amount of blacks in the upper-income category.<sup>132</sup>

Thus, since 1970, there has been a steady expansion in the proportion of black families in the upper-income category (up by 9.7%) and a substantial decrease in the proportion of black families in the lower-income group (down by 15%).<sup>133</sup> The percentage of black families in the moderate income category has changed by only 5 percentage points since the 1970s.<sup>134</sup> Nevertheless, in spite of significant improvements in the percent of blacks in the moderate- and upper-income group and the decline in the percentage in the lower-income group, over half of black families still have annual incomes that are less than \$50,000.<sup>135</sup> While the proportion of blacks in the moderate- and upper-income groups increased steadily between the 1980s and 1990s, these changes appeared to have leveled off for all three groups during the 2000s.<sup>136</sup>

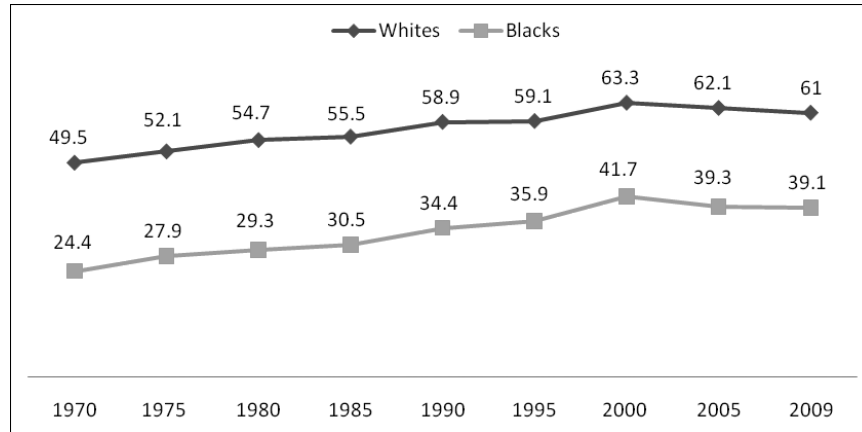
If we combine the moderate- and upper-income groups to garner an estimate of the proportion of the black population that would represent the middle-class group, we would see that there has been a significant expansion in the size of this group as shown in Graph 4. During the 1970s, the estimated proportion of families in this group increased by 4.9%.<sup>137</sup> During the decade of the 1980s, it increased by 5.1% and by another 7.3% during the 1990s.<sup>138</sup> However, during the 2000s, the estimated proportional size of the black families in the middle-class decreased by 2.6%.<sup>139</sup>

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131. *See id.*  
132. *See id.*  
133. *See id.*  
134. *See id.*  
135. *See id.*  
136. *See id.*  
137. *See id.*  
138. *See id.*  
139. *See id.*



**Graph 4**  
**Proportion of Families with Incomes Above**  
**\$50,000 by Race: 1970-2009**



Source: U.S. CENSUS BUREAU, FAMILIES BY TOTAL MONEY INCOME, RACE, AND HISPANIC ORIGIN OF HOUSEHOLDER: 1967 TO 2009 tbl. F-23 (2010), available at [http://www.census.gov/hhes/www/income/data/historical/families/2010/F23\\_2010.xls](http://www.census.gov/hhes/www/income/data/historical/families/2010/F23_2010.xls)

In spite of significant improvements, the median income of black families is still less than two-thirds the income of white families. In 1970, the median income for black families was \$29,921 (in constant 2009 dollars) compared to \$48,777 for white families.<sup>140</sup> By 2009, the median income for black families had increased to \$38,409 compared to \$62,545 for white families.<sup>141</sup> This meant that, in 1970 and 2009, for every one dollar earned by a white family, a black family earned sixty-one cents. In essence, there has been no measurable change in the black/white income ratio since 1970. The black family/white family income ratio did get as small as 0.64 (or to put it another way, the average black family earned 64 cents for every dollar earned by the average white family) in 2000.<sup>142</sup>

Despite a significant rise in the proportion of black families in the moderate- and upper-income groups, the proportion of black families in these income groups in 2009 was still more than twenty percentage points smaller than that of white families as shown in Graph 4. However, it should be noted that between 1970 and 2000, the proportion of

140. *See id.*  
141. *See id.*  
142. *See id.*

black families in the middle- to upper-income groups increased at a faster rate than the proportion of white families.<sup>143</sup> During this 30-year period, the proportion of white families in the middle-income group increased by 13.8%, while the percentage of black families in this group grew by 17.3%.<sup>144</sup>

During the 2000s, both percentages of black and white families in the moderate- and upper-income groups have declined roughly 2%.<sup>145</sup> Nevertheless, according to a PEW Research Center Report, the median wealth of white households was 20 times that of black households, and this was the largest gap between the two groups in over 25 years.<sup>146</sup> Some of the income and wealth disparities between blacks and whites can be attributed to the high proportion of blacks clustered into lower-level white collar occupations (such as sales and clerical), while middle-class whites tend to be evenly split between higher level occupations (professionals and managers) and lower level jobs.<sup>147</sup> Another socioeconomic reality that impedes the wealth development of middle-class blacks is their relationships with family and friends. A large proportion of the black middle-class is first or second generation.<sup>148</sup> They are more likely to have grown up poor and are likely to have siblings or other family members and friends who are poor.<sup>149</sup> Middle-class blacks are more likely to provide financial assistance to their relatives which interferes with their wealth accumulation.<sup>150</sup>

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143. *See id.*

144. *See id.*

145. *See id.*

146. *See* RAKESH KOCHAR, RICHARD FRY & PAUL TAYLOR, PEW RESEARCH CTR., WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS (2011), available at [http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report\\_7-26-11\\_FINAL.pdf](http://www.pewsocialtrends.org/files/2011/07/SDT-Wealth-Report_7-26-11_FINAL.pdf).

147. *See* EMPLOYED PERSONS, *supra* note 85, at 12-13. *See generally* F.H. Wilson, *Rising Tide or Ebb Tide? Recent Changes in the Black Middle Class in the U.S., 1980-1990*, 8 RES. IN RACE & ETHNIC REL. 21-55 (1995).

148. *See generally* J. WHEARY, THE FUTURE MIDDLE CLASS: AFRICAN AMERICANS, LATINOS AND ECONOMIC OPPORTUNITY IN THE 21ST CENTURY (2006) available at [http://archive.demos.org/pubs/african\\_americans\\_and\\_latinos\\_ebook.pdf](http://archive.demos.org/pubs/african_americans_and_latinos_ebook.pdf) (suggesting that access to economic opportunity and wealth is a recent trend for African Americans, as such access was stymied to previous generations because of discriminatory practices).

149. *See generally* N.S. Chiteji & D. Hamilton, *Family Connections and the Black-White Wealth Gap Among Middle Class Families*, 30 REV. OF BLACK POL. ECON. 9-27 (2002); C.M. Heflin & M. Patillo, *Poverty in the Family: Race, Siblings, and Socioeconomic Heterogeneity*, 35 SOCIAL SCI. RES. 804-822 (2006).

150. *See* C.Z. Charles, G. Dinwiddie & D. Massey, *The Continuing Consequences of Segregation: Family Stress and College Academic Performance*, 85 SOC. SCI. Q. 1353, 1356 (2004). *See generally* WHEARY, *supra* note 148; Chiteji & Hamilton, *supra* note 149; Heflin & Patillo, *supra* note 149.

V. INCOME DISPARITIES AMONG AFRICAN AMERICAN HOUSEHOLDS

The opportunities made available by civil rights legislation of the 1960s have not been evenly distributed. Some blacks financially are much better off than others. This has resulted in a population that is increasingly segmented by income.<sup>151</sup> The blacks that prospered as a result of civil rights advances are in a much higher socioeconomic position than their forbears. The more prosperous blacks are often better educated, they have more occupational opportunities, and enjoy a higher standard of living in comparison to the less affluent blacks. Not surprisingly, affluent blacks receive a greater proportion of the income of blacks as a group.<sup>152</sup>

As previously mentioned, the proportion of black families in the higher-income group (over \$100,000 annual income) grew from 2.4% in 1970 to 12.1% in 2009.<sup>153</sup> While a significant proportion of black families are financially prosperous, a larger proportion continues to struggle financially contributing to economic disparities among blacks.<sup>154</sup>

One way of assessing the growing economic disparities is by examining the distribution of income within the black population. Populations are often divided into quintiles, and the aggregate income received by each group is then determined. Graph 5 shows changes in the uneven distribution of income among blacks over time. In 1970, the top 20% of black households accounted for only 43.1% of the all of the black household income during that year.<sup>155</sup> By 2009, the top 20% of black households received half of the income received by black households that year.<sup>156</sup> Among black households, the top 20% of black households was the only quintile that saw an increase in its

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151. See generally GERALD DAVID JAYNCE & ROBIN WILLIAMS, JR., *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 274-77 (1989); WILLIAM J. WILSON, *THE DECLINING SIGNIFICANCE OF RACE: BLACKS AND CHANGING AMERICAN INSTITUTIONS* 122-43 (1978); James P. Smith & Finis R. Welch, *Black Economic Progress After Myrdal*, 27 J. ECON. LITERATURE 519 (1989).

152. See U.S. CENSUS BUREAU, *MEAN INCOME RECEIVED BY EACH FIFTH AND TOP 5 % OF BLACK FAMILIES: 1966 TO 2010* tbl.F-3 (2011), available at [http://www.census.gov/hhes/www/income/data/historical/families/2010/F03B\\_2010.xls](http://www.census.gov/hhes/www/income/data/historical/families/2010/F03B_2010.xls) [hereinafter Table F-3]

153. TABLE F-23, *supra* note 118.

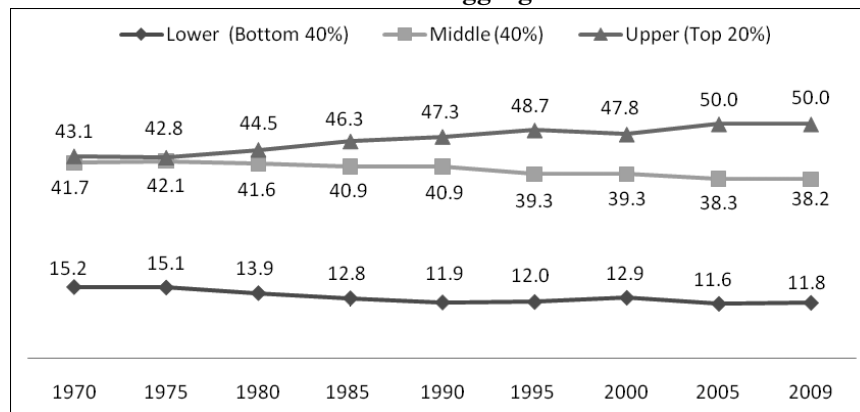
154. This interpretation is based on the earlier presented data.

155. U.S. CENSUS BUREAU, *SHARE OF AGGREGATE INCOME RECEIVED BY EACH FIFTH AND TOP 5 PERCENT OF BLACK HOUSEHOLDS: 1967 TO 2010* tbl.H-2, [http://www.census.gov/hhes/www/income/data/historical/household/2010/H02B\\_2010.xls](http://www.census.gov/hhes/www/income/data/historical/household/2010/H02B_2010.xls) (last visited Feb. 27, 2012).

156. *Id.*

share of income received over the past 40 years.<sup>157</sup> In 1970, the top 5% of the black households received 15.2% of all the income received by black households that year. By 2009, the proportion of the income received by this group had increased to 21.3%.<sup>158</sup> The bottom 20% of black households earned an average of \$8,131, the second quintile earned an average of \$23,128, and the top 5% earned an average of \$225,392 in 2009.<sup>159</sup>

**Graph 5**  
**Growing Economic Disparities Among Black Families**  
**Based on Shared Aggregate Income**



Source: U.S. CENSUS BUREAU, MEAN INCOME RECEIVED BY EACH FIFTH AND TOP 5% OF BLACK FAMILIES: 1966 TO 2009, tbl. F-3 (2010). This information is derived from the U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplements. For information on confidentiality protection, sampling error, nonsampling error, and definitions, see [www.census.gov/aprd/techdoc/cps/cpsmar10.pdf](http://www.census.gov/aprd/techdoc/cps/cpsmar10.pdf) [PDF].

While the proportion of the income received by the top 20% of black families has increased steadily since 1970, the proportion of income received by the middle 40% (third and fourth quintiles) and bottom 40% (or two lower quintiles) has declined.<sup>160</sup> The proportion of the income received by the middle-income group declined from 41.7%

157. *See id.*

158. These black families have incomes above \$141,439 (in constant 2009 dollars).

159. TABLE F-3, *supra* note 152.

160. *See* U.S. CENSUS BUREAU, SHARE OF AGGREGATE INCOME RECEIVED BY EACH FIFTH AND TOP 5% OF BLACK FAMILIES: 1966 TO 2010 tbl.F-2 (2011), available at [http://www.census.gov/hhes/www/income/data/historical/families/2010/F02B\\_2010.xls](http://www.census.gov/hhes/www/income/data/historical/families/2010/F02B_2010.xls) [hereinafter TABLE F-2].

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in 1970 to 38.2% in 2009.<sup>161</sup> In 1970, the bottom 40% received 15.2% of all of the income received by black families that year.<sup>162</sup> By 2009, the average share of income of the bottom 40% declined by 3.4% to 11.8%.<sup>163</sup> Researchers predict that 65% of blacks who start in the bottom half of the income distribution will not improve their economic status.<sup>164</sup>

VI. HOMEOWNERSHIP AND RESIDENTIAL  
SEGREGATION

Homeownership is another indicator of the economic disparities among blacks. Perhaps equally important, it is a gauge that can be used to measure the continuing significance of race in the accumulation of wealth. As shown in Graph 6, since 1994 there has been an increase in black home ownership.<sup>165</sup> Between 1994 and 2003, the proportion of black homeowners increased from 42.6% to a record high of 49.4%.<sup>166</sup> From 2003 to 2010, however, the proportion of black homeowners declined to 44.9%.<sup>167</sup> Much of black home ownership resulted from whites moving to the suburbs<sup>168</sup> and blacks purchasing older homes in central cities or as in recent years sub-suburban communities.

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161. *See id.*

162. *See id.*

163. *See id.*

164. *See* BHASHKAR MAZUMDER, UPWARD INTERGENERATIONAL ECONOMIC MOBILITY IN THE UNITED STATES, ECONOMIC MOBILITY PROJECT 8, 16 (2009), *available at* [http://www.economicmobility.org/assets/pdfs/PEW\\_EMP\\_UPWARD\\_INTERGENERATIONAL.pdf](http://www.economicmobility.org/assets/pdfs/PEW_EMP_UPWARD_INTERGENERATIONAL.pdf).

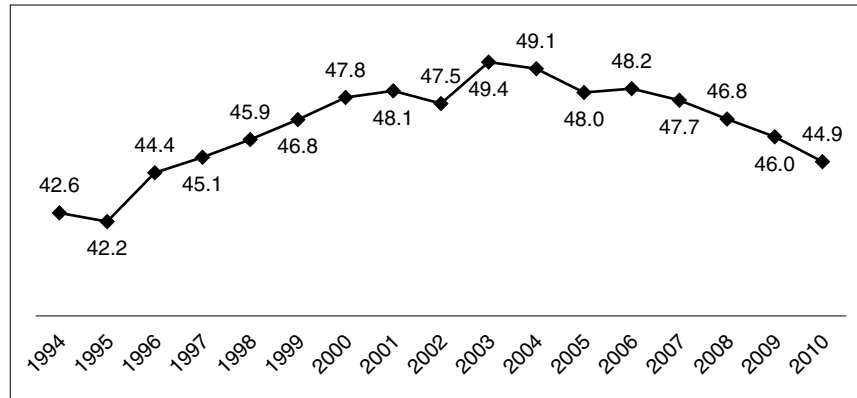
165. *See* U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER: 1994 TO PRESENT tbl.16 (2011), *available at* <http://www.census.gov/hhes/www/housing/hvs/historic/files/histtab16.xls>.

166. *See id.*

167. *See id.*

168. *See generally* Leah Platt Boustan & Robert A. Margo, *White Suburbanization and African-American Home Ownership, 1940-1980* (Nat'l Bureau Econ. Research, Paper No. 16702, 2011), *available at* <http://www.nber.org/papers/w16702> (chronicling the migration of white households to the suburbs and the resulting increase of black homeownership in the cities between the 1940s and 1980s).

**Graph 6**  
**Blacks' Homeownership Rates: 1994-2010**



Source: U.S. CENSUS BUREAU, HOMEOWNERSHIP RATES BY RACE AND ETHNICITY OF HOUSEHOLDER: 1994 TO PRESENT (2010). This information is derived from the Current Population Survey/Housing Vacancy Survey, Series H-111

Residential segregation has long been a formidable barrier to black progress and the accumulation of wealth. When northern and midwestern cities began to industrialize at the beginning of the twentieth century, thousands of African American families migrated from the rural South to cities in the Northeast and the Midwest.<sup>169</sup> They joined the thousands of immigrants from Western Europe to provide the labor needed for a rapidly industrializing economy.<sup>170</sup> When they arrived in urban communities, black migrants encountered many residential obstacles. Municipal ordinances were enacted that prohibited African Americans from occupying properties except in designated neighborhoods.<sup>171</sup> The ordinances were challenged and declared unconstitutional in a 1917 decision, *Buchanan v. Warley*.<sup>172</sup>

169. See, e.g., NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT MIGRATION AND HOW IT CHANGED AMERICA* 6 (1991) (detailing the migration of blacks from the rural South to the urban North); MYRDAL, *supra* note 2 at 182-204; ISABEL WILKERSON, *THE WARMTH OF OTHER SUNS: THE EPIC STORY OF AMERICA'S GREAT MIGRATION* 8-14 (2010) (recounting the multi-decade migration of blacks from the South to northern and western cities in search of a better life).

170. See, e.g., LEMANN, *supra* note 169 at 16; WILKERSON, *supra* note 169, at 181-221.

171. See, e.g., LEMANN, *supra* note 169 at 63; WILKERSON, *supra* note 169, at 371-78.

172. *Buchanan v. Warley*, 245 U.S. 60, 81-82 (1917) (basing the ruling on the unconstitutionality of interfering with a citizen's property rights rather than the equality of rights for African Americans); see also DAVID DELANEY, *RACE, PLACE, AND THE LAW: 1836-1948*, at 145 (1998).

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After *Buchanan*, the real estate industry devised another tactic, racially restrictive covenants. The covenants were clauses in deeds that prohibited property owners and subsequent purchasers from selling their homes to racial and religious minorities.<sup>173</sup> The Supreme Court implicitly endorsed the covenants in a 1926 decision, *Corrigan v. Buckley*.<sup>174</sup> The Fourteenth Amendment applies only to “state action” which consists of actions taken by state and local governments.<sup>175</sup> The Court declined to decide the merits of *Corrigan* on jurisdictional grounds, but it issued an opinion that stated the Fourteenth Amendment did not prohibit private parties from controlling the use and disposition of their property.<sup>176</sup>

As the migration from field to factory continued, an already severe housing shortage for African Americans grew worse. Blacks were shoehorned into existing ghettos that expanded as whites moved out of adjacent neighborhoods. In the 1940s, the National Association for the Advancement of Colored People (“NAACP”) launched a litigation campaign that challenged restrictive covenants.<sup>177</sup> In 1948, the Supreme Court held in *Shelley v. Kraemer*<sup>178</sup> that restrictive covenants were private arrangements, but the judicial enforcement of discriminatory agreements constituted state action that violated the Fourteenth Amendment.<sup>179</sup> After *Shelley*, the covenants could not be enforced.<sup>180</sup> This was an important victory for the NAACP, but it did not end discrimination in the nation’s housing markets.<sup>181</sup>

The federal government played a critical role in the institutionalization of discrimination and the perpetuation of segregation.<sup>182</sup> The modern American middle-class emerged during the post-World War II era.<sup>183</sup> Before the war, working class whites lived in ethnic enclaves in cities or in small towns and rural communities.<sup>184</sup> The 1944 G.I. Bill

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173. Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 67 WASH. U.L.Q. 737, 742-45 (1989).

174. *Corrigan v. Buckley*, 271 U.S. 323, 332 (1926) (affirming, in effect, the ruling of the appellate court by dismissing the case for lack of jurisdiction).

175. *See generally* Civil Rights Cases, 109 U.S. 3, 23 (1883).

176. *See id.*

177. *See* Ware, *supra* note 173, at 742-45.

178. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

179. *See id.* at 20.

180. *See id.*

181. *See* Ware, *supra* note 173, at 768-72.

182. *See* KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190-218* (1985)

183. *See* KENNETH FOX, *METROPOLITAN AMERICA: URBAN LIFE AND URBAN POLICY IN THE UNITED STATES, 1940-1980*, at 50-78 (1990).

184. *See id.*

provided returning veterans with financial assistance for college, businesses, and home mortgages.<sup>185</sup> Millions of servicemen were able to afford homes for the first time.<sup>186</sup> In 1947, real estate developer William Levitt purchased 4,000 acres of Long Island, New York farmland and converted it into the largest privately planned community in American history.<sup>187</sup> Similar suburban communities were constructed in metropolitan regions across the nation.<sup>188</sup> Residential construction rose from 114,000 new homes in 1944 to 1.7 million by 1950.<sup>189</sup> All of this was facilitated by the introduction of fixed-rate, 30-year mortgages insured by the Veterans Administration and Federal Housing Authority (FHA).<sup>190</sup>

Blacks were excluded from post-war suburbanization.<sup>191</sup> The Home Owners' Loan Corporation ("HOLC"), a federal agency established during the 1930s depression, fostered residential segregation through "redlining."<sup>192</sup> Land economists believed that property values were closely linked to the racial composition of neighborhoods. The HOLC rated every urban and suburban neighborhood in America "A," "B," "C," or "D" using color coded maps.<sup>193</sup> The lowest quality rating, "D," was colored red. Neighborhoods rated "A" had to be homogenous and occupied by the families of business and professional men who were white and usually native-born.<sup>194</sup> Neighborhoods in which blacks resided were rated "D" and coded red.<sup>195</sup> Lenders were discouraged from making loans in neighborhood that were redlined.<sup>196</sup>

The FHA used HOLC's system to develop criteria for selecting the mortgages it would insure.<sup>197</sup> The FHA's underwriting standards reflected the model of neighborhood change developed by economist Homer Hoyt. In his influential 1939 book, *The Structure and Growth*

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185. *See id.*

186. *See id.*

187. *See* Richard Lacayo, *Suburban Legend: William Levitt*, TIME, Dec. 7, 1998, at 2.

188. *See* Claire Suddath, *A Brief History of the Middle Class*, TIME, Feb. 27, 2009, at 1.

189. *See id.*

190. DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY AND WHITE RACIAL POLITICS IN SUBURBAN AMERICA 113-22 (2010); JACKSON, *supra* note 182, at 197-203; .

191. *See also* OLIVER & SHAPIRO, *supra* note 64, at 16-18. *See generally* FREUND, *supra* note 190, at 113-22.

192. OLIVER & SHAPIRO, *supra* note 64, at 16-18.

193. JACKSON, *supra* note 182, at 207-10.

194. *Id.*

195. *Id.*

196. Benjamin Howell, *Exploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CAL. L. REV. 101, 107-08 (2006).

197. FREUND, *supra* note 190, at 175-90.



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of *Residential Neighborhoods in American Cities*, Hoyt described the patterns of development residential neighborhoods according to the succession theory of neighborhood change.<sup>198</sup> Under the succession theory of urban development, ethnic and racial groups entering a new area settle in older neighborhoods until they achieve economic parity with more affluent groups.<sup>199</sup> As the newer group becomes economically successful, it moves out to a better residential area.<sup>200</sup> With continued immigration, new ethnic groups settle in the older neighborhoods replacing those who moved on.<sup>201</sup> This pattern continues, creating a succession of groups moving through the neighborhoods over time.<sup>202</sup>

In this invasion-succession model, newly constructed neighborhoods were occupied by white families.<sup>203</sup> Over time, the neighborhood transitioned from white Protestant to Jewish and finally black as the housing stock grew older and began to deteriorate.<sup>204</sup> The FHA assigned every neighborhood a place somewhere along this continuum.<sup>205</sup> FHA's *Underwriting Manual* warned lenders that neighborhoods could retain their values only if the properties were occupied by

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198. See generally HOMER HOYT, *THE STRUCTURE AND GROWTH OF RESIDENTIAL NEIGHBORHOODS IN AMERICAN CITIES* (1939), available at [http://www.archive.org/stream/structuregrowtho00unitrich\\_djvu.txt](http://www.archive.org/stream/structuregrowtho00unitrich_djvu.txt).

199. Michael J. White, *Racial and Ethnic Succession in Four Cities*, 20 *URB. AFF. REV.* 165, 165-83 (1984).

200. *Id.*

201. *Id.*

202. *Id.*

203. Adam Gordon, *The Creation of Homeownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and out of Reach for Blacks*, 115 *YALE L.J.* 186, 208 (2005).

204. Hoyt wrote,

If the entrance of a colored family into a white neighborhood causes a general exodus of the white people . . . [it] is reflected in property values. Except in the case of negroes and Mexicans, however, these racial and national barriers disappear when the individuals of the foreign nationality groups rise in the economic scale or conform to the American standards of living . . . . While the ranking may be scientifically wrong from the standpoint of inherent racial characteristics, it registers an opinion or prejudice that is reflected in land values; it is the ranking of race and nationalities with respect to their beneficial effect upon land values. Those having the most favorable effect come first in the list and those exerting the most detrimental effect appear last: 1. English, Germans, Scots, Irish, Scandinavians 2. North Italians 3. Bohemians or Czechoslovakians 3. Poles 4. Lithuanians 5. Greeks 6. Russian Jews of lower class 6. South Italians . . . 9. Negroes 10. Mexicans.

HOMER HOYT, *ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO* 316 (1933), available at [http://www.archive.org/stream/onehundredyearso00hoytrich/onehundredyearso00hoytrich\\_djvu.txt](http://www.archive.org/stream/onehundredyearso00hoytrich/onehundredyearso00hoytrich_djvu.txt).

205. JACKSON, *supra* note 182, at 207-10.

the same social classes and racial groups.<sup>206</sup> The agency urged the use of restrictive covenants to maintain neighborhood stability.<sup>207</sup>

After the decision in *Shelley*, the FHA made some cosmetic changes to its *Underwriting Manual* and removed the explicit references to race.<sup>208</sup> However, the *Manual* continued to warn against the introduction of adverse influences that would diminish desirability or lower property values.<sup>209</sup> Local real estate boards warned members not to be instrumental in introducing elements into a neighborhoods that would be detrimental to the property values and explicitly included blacks among the undesirable elements.<sup>210</sup> Real estate publications used in college and university courses and by practicing realtors continued to urge segregating “inharmonious populations.”<sup>211</sup> Revised editions of *Hoyt’s Principles of Urban Real Estate*<sup>212</sup> toned down some of its racial references but did not abandon its message that white neighborhoods needed protection from “inharmonious” groups.<sup>213</sup> From the 1940s though the late 1960s, federal housing policies barred African Americans from the largest wealth-producing program in American history: single family, suburban homes purchased with federally insured mortgages.<sup>214</sup>

## VII. CONTINUING NEIGHBORHOOD SEGREGATION

The Fair Housing Act of 1968<sup>215</sup> prohibited discrimination based upon race, color, religion, sex, and national origin in connection with the sale or rental of residential housing. Not long after the enactment of the 1968 legislation, however, fair housing advocates recognized the shortcomings of the statute.<sup>216</sup> The original administrative enforcement mechanism was limited to conciliation, a process encouraging

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206. *Id.* at 208.

207. *Id.*

208. FREUND, *supra* note 190, at 208-09.

209. *Id.*

210. *Id.*

211. *Id.*

212. See generally ARTHUR M. WEIMER & HOMER HOYT, *PRINCIPLES OF URBAN REAL ESTATE* (3d ed. 1954).

213. *Id.*

214. OLIVER & SHAPIRO, *supra* note 64, at 16-18; FREUND, *supra* note 190, at 5, 6.

215. See generally Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified as amended at 42 U.S.C. §§ 3601-3619 (2000)). The Act prohibits discrimination by housing providers whose actions make housing unavailable to persons because of race, sex, color, national origin, disability, or familial status.

216. Leland Ware, *New Weapons for an Old Battle: The Enforcement Provisions of the 1988 Amendments to the Fair Housing Act*, 7 ADMIN. L.J. AM. U. 59, 78-79 (1993).

voluntary compliance that the real estate industry largely ignored. Congress eventually became aware of these failings. In 1988, a comprehensive overhaul of the Fair Housing Act was enacted.<sup>217</sup> Despite the enhanced enforcement mechanisms that the 1988 Amendments added, discriminatory practices are pervasive in the nation's housing markets. African American families do not enjoy the residential options that are available to white families with similar incomes and credit histories.<sup>218</sup>

A Department of Housing and Urban Development (HUD) report, based on data derived from matched pair tests conducted over several months, found that African American homebuyers and renters continue to encounter discrimination in the nation's housing markets.<sup>219</sup> White homebuyers were favored over blacks in 17% of tests. White homebuyers were more likely to be allowed to inspect houses and to be shown homes in more predominantly white neighborhoods than similarly situated blacks.<sup>220</sup> Whites also received more information about financing than comparable black homebuyers.<sup>221</sup>

In a 2002 survey, researchers found that while housing discrimination declined, it still exists at high levels.<sup>222</sup> In rental and sales markets in metropolitan areas nationwide, black and Hispanic home seekers experienced significant levels of adverse treatment, compared to similarly situated white homes seekers.<sup>223</sup> The extent to which whites were consistently favored over blacks was 17%.<sup>224</sup> Blacks experienced adverse treatment, compared to equally qualified whites, about half the times that they visited real estate or rental offices to inquire about the availability of housing advertised in the major metropolitan newspaper.<sup>225</sup>

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217. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601- 3631 (2000)).

218. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS UNDERMINE THE AMERICAN DREAM* 88-92 (2004).

219. MARGERY AUSTIN TURNER, STEPHEN L. ROSS, GEORGE C. GALSTER & JOHN YINGER, *DISCRIMINATION IN METROPOLITAN HOUSING MARKETS: NATIONAL RESULTS FROM PHASE I HDS 2000*, at iv (2002), [http://www.huduser.org/portal/Publications/pdf/Phase1\\_Report.pdf](http://www.huduser.org/portal/Publications/pdf/Phase1_Report.pdf); see also JOHN YINGER, *CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION* 19-22, 33-39, 41-42 (1995); JOHN YINGER, *HOUSING DISCRIMINATION STUDY: INCIDENCE OF DISCRIMINATION AND VARIATIONS IN DISCRIMINATORY BEHAVIOR*, (1991).

220. TURNER, ROSS, GALSTER & YINGER, *supra* note 219, at iv.

221. *Id.*

222. *Id.*

223. *Id.* at iv-v.

224. *Id.* at iv.

225. *Id.*

Showing black and white buyers homes in different neighborhoods is referred to as “steering.”<sup>226</sup> It is driven by real estate agents’ assumption that whites will not want to live in neighborhoods with more than a token number of minority residents.<sup>227</sup> This unlawful practice is widespread and researchers have found that real estate agents are now using schools as a proxy for race.<sup>228</sup> White home seekers were discouraged from considering homes in racially mixed neighborhoods on the grounds that the local schools were “bad.”<sup>229</sup> This was a coded message which meant the schools had high minority enrollments.<sup>230</sup> The researchers also found that neighborhoods from which whites were steered were recommended favorably to African American and Latino purchasers.<sup>231</sup>

Studies have consistently shown that whites will desert neighborhoods when they reach a “tipping point” and become “too black.”<sup>232</sup> This was confirmed more recently in *Tipping and the Dynamics of Segregation*,<sup>233</sup> where the authors found strong evidence that white flight occurred in most cities when neighborhoods reached tipping points ranging from 5% to 20% minority populations.<sup>234</sup> In *Dynamic Models of Segregation*, Thomas Schelling showed that extreme segregation can arise from social interactions and white preferences.<sup>235</sup>

White flight is fueled by the perception that the presence of African Americans in a neighborhood causes property values to decline.<sup>236</sup> This belief is driven by stereotypes, overt bias, and unconscious dis-

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226. NAT’L FAIR HOUS. ALLIANCE, UNEQUAL OPPORTUNITY—PERPETUATING HOUSING SEGREGATION IN AMERICA 9 (2006), available at, <http://mvfairhousing.com/pdfs/2006%20Fair%20Housing%20Trends%20Report.PDF>.

227. *Id.* at 10-11.

228. *Id.* at 11.

229. *Id.* at 12.

230. *Id.*

231. *Id.*

232. Thomas Schelling, *Dynamic Models of Segregation*, 1 J. MATHEMATICAL SOC. 143-86 (1971).

233. See generally David Card, Alexandre Mas & Jesse Rothstein, *Tipping and the Dynamics of Segregation*, 123 Q. J. OF ECON. 177, 177-218 (2008).

234. *Id.*

235. Schelling, *supra* note 232, at 143-86.

236. Bruce L. Ackerman, *Integration for Subsidized Housing and the Question of Racial Occupancy Controls*, 26 STAN. L. REV. 245, 251-54 (1974) (discussing the 25%-60% “tipping point” at which white families have been documented to flee a neighborhood because its growing numbers of black residents will mark it as a “Black neighborhood”); Margalynne Armstrong, *Race and Property Values in Entrenched Segregation*, 52 U. MIAMI L. REV. 1051, 1052-59 (1998) (discussing the longstanding perception of many white realtors, home-sellers and buyers that the presence of African Americans in a neighborhood causes property values to decline).

crimination.<sup>237</sup> Polling data indicates that most whites believe residential segregation reflects the preferences of African Americans.<sup>238</sup> However, the empirical evidence rebuts these claims.<sup>239</sup> Kryson and Farley found that African Americans prefer mixed communities in which the racial balance is 50% white and 50% black.<sup>240</sup>

A great deal of progress has been made over the last 40 years, but high levels of residential segregation persist.<sup>241</sup> A study using census data from 2005-2009 determined that progress toward housing integration came to a halt during the first decade of the 21st century.<sup>242</sup> The data showed that the average white person lives in a neighborhood that is 77% white.<sup>243</sup> The average African American resides in a neighborhood that is majority black.<sup>244</sup> African Americans are the most segregated minority, followed by Hispanics and Asians.<sup>245</sup>

Social scientists measure neighborhood segregation using an “index of dissimilarity.”<sup>246</sup> This calculates how evenly different racial groups are distributed across metropolitan areas. The lowest possible value, zero, indicates that the percentage of each racial group in every neighborhood is the same as their overall percentage in the metropolitan area.<sup>247</sup> For example, if African Americans constitute 20% of the population in a metropolitan area, a zero on the index means blacks are 20% of the population in each neighborhood.<sup>248</sup> The highest value, 100, indicates that racial groups reside in completely different neighborhoods.<sup>249</sup>

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237. Armstrong, *supra* note 236, at 1057-58.

238. Jack Ludwig, *Blacks and Whites Still Perceive Local Treatment of Blacks Differently* (May 27, 2003), <http://www.gallup.com/poll/8476/blacks-whites-still-perceive-local-treatment-blacks-differently.aspx>. A CNN poll contains similar findings. *Poll: Most Americans See Lingering Racism—in Others*, CNN (Dec. 12, 2006), [http://articles.cnn.com/2006-12-12/us/racism.poll\\_1\\_whites-blacks-racism?\\_s=PM:US](http://articles.cnn.com/2006-12-12/us/racism.poll_1_whites-blacks-racism?_s=PM:US).

239. Maria Kryson & Reynolds Farley, *The Residential Preferences of Blacks: Do They Explain Segregation*, 80 SOC. FORCES, 937 938-39 (2002) .

240. *Id.*

241. LOGAN & STULTS, *supra* note 21, at 1-2, 4.

242. *Id.* at 16.

243. *Id.* at 2.

244. *Id.* at 8.

245. *Id.* at 2.

246. UNIV. OF MICH. POPULATION STUDIES CTR., RESIDENTIAL SEGREGATION: WHAT IT IS AND HOW WE MEASURE (2000), <http://enceladus.isr.umich.edu/race/seg.html>; CENSUSSCOPE, [http://www.censuscope.org/us/s40/p75000/chart\\_dissimilarity.html](http://www.censuscope.org/us/s40/p75000/chart_dissimilarity.html) (last visited June 15, 2011); .

247. CENSUSSCOPE, *supra* note 246.

248. *Id.*

249. *Id.*

An index of 60 or higher denotes high levels of segregation. A neighborhood with an index of 30 or lower is considered integrated.<sup>250</sup> By this measure, black-white segregation averaged 65.2 in 2000 and 62.7 in 2009.<sup>251</sup> Hispanic-white segregation was 51.6 in 2000 and is currently 50.<sup>252</sup> Asian-white segregation has grown from 42.1 to 45.9.<sup>253</sup> This was a nationwide measure.<sup>254</sup> The levels of segregation in many of America's largest cities are much higher.<sup>255</sup>

### VIII. THE SUBURBANIZATION OF THE BLACK MIDDLE-CLASS

Between 1970 and 1995, 7 million blacks moved to suburban communities.<sup>256</sup> This number is considerably larger than the 4.5 million blacks who moved from the South to the North during the great migration that took place during the first half of the 20th century.<sup>257</sup> The movement of middle-class blacks to suburban communities has contributed to cultural and spatial divisions within the black population.<sup>258</sup> In the mid-1970s, more than 60% of blacks lived in cities in which the population was greater than 50,000.<sup>259</sup> Only 7.3% of the African American population lived in suburban communities.<sup>260</sup> By the mid-2000s, the proportion of blacks living in suburban areas increased to nearly 30%.<sup>261</sup> The numbers living in cities declined to approximately 30%.<sup>262</sup>

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250. *Id.*

251. Press Release, Russell Sage Found. & Brown Univ., US2010: Discover America in a New Century (Dec. 14, 2010), <http://www.s4.brown.edu/us2010/ForPress/Releasefiles/Release12142010.pdf>.

252. *Id.*

253. *Id.*

254. LOGAN & STULTS, *supra* note 21, at 5, 24, 25.

255. *See generally id.* (listing the segregation data for blacks, Hispanics, and Asians in various major metropolitan cities.).

256. ABIGAIL & STEPHAN THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 212 (1999).

257. *Id.*

258. *See generally* P.A. Jargowsky, *Take the Money and Run: Economic Segregation in the U.S. Metropolitan Areas*, 61 *AM. SOC. REV.* 984, 984-98 (1996) (discussing the increasing economic segregation in recent decades particularly for minority groups in the 1980s); Douglas Massey & M. Evers, *The Ecology in Inequality: Minorities and the Concentration of Poverty 1970-1980*, 95 *AM. J. SOC.* 1153, 1155, 1170 (1990).

259. These estimates are based on data found in the 1972-2006 General Social Surveys. *See supra* Graph 2.

260. *Id.*

261. *Id.*

262. *Id.*

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However, many suburban blacks live in older, inner-ring suburbs that are less affluent, less white, and have higher levels of crime and social disorganization than suburban communities where comparable whites reside.<sup>263</sup> Blacks live in neighborhoods that are, on average, 15 to 20% less affluent than other groups with a comparable status.<sup>264</sup> Middle-class and affluent blacks in the most segregated U.S. cities live in areas with substantially more whites than their poor, inner-city counterparts. The suburban areas where middle-class and affluent blacks live are significantly less white and less affluent than their white counterparts.<sup>265</sup>

Despite increased economic opportunities and Fair Housing laws, there are still high levels of residential segregation.<sup>266</sup> Middle-class blacks who live in racially mixed neighborhoods tend to have higher levels of education and income than their white neighbors.<sup>267</sup> However, blacks in the higher socioeconomic category (those in the top fifth) were more integrated than blacks in lower socioeconomic categories.<sup>268</sup> Blacks in the higher income category have more white neighbors, fewer poor neighbors, and they reside in neighborhoods with higher housing values.<sup>269</sup>

In *Black Picket Fences*,<sup>270</sup> Patillo-McCoy studied a black, middle-class neighborhood located adjacent to the south side of Chicago. Her book chronicles the evolution of “Groveland” a fictional name for a neighborhood that Patillo-McCoy studied for three and one-half years.<sup>271</sup> Her focus was the interplay between race, class, and structural inequality in black communities.<sup>272</sup> As blacks entered Grove-

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263. Camille Zubrinsky Charles, *The Dynamics of Residential Segregation*, 29 ANN. REV. SOC. 167, 178 (2003).

264. *Id.* at 179.

265. *Id.*

266. See generally M. Patillo-McCoy, *The Limits of Out-Migration for the Black Middle-Class*, 22 J. URB. AFF. 225-41 (2000) (discussing the socio-economic diversity in the black community and the black middle-class invisibility).

267. Janet Hope, *The Price They Pay for the Places They Live: A Case Study of the Association of Educational Achievement and Aspirations with Residential Incongruence Among Middle-Class Black Adolescents*, in AMERICAN FAMILIES: ISSUES IN RACE AND ETHNICITY 407, 408 (C.K. Jacobson ed., 1995).

268. John Iceland, Cicely Sharpe & Erika Steinmetz, *Class Differences in African-American Residential Patterns in U.S. Metropolitan Areas: 1990-2000*, 34 SOC. SCI. RES. 252, 252-66 (2005).

269. Lance Freeman, *Is Class Becoming a More Important Determinant of Neighborhood Attainment for African-Americans?*, 44 URB. AFF. REV. 3, 3-26 (2008).

270. See generally MARY PATILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* (1999).

271. *Id.* at 1.

272. See *id.*

land during the 1950s and '60s, whites quietly moved out.<sup>273</sup> Within a few years the neighborhood became entirely black.<sup>274</sup> The residents were a mix of college educated professionals and unionized factory workers with good salaries and benefits. Some of the men worked two jobs to support their families.<sup>275</sup> The residents maintained their homes and manicured their lawns.<sup>276</sup> They attended neighborhood churches and created civic and social organizations for themselves and their children.<sup>277</sup>

As time went on, the neighborhood took on a black identity. As white merchants moved out, black entrepreneurs moved in.<sup>278</sup> At the intersection of one of the main thoroughfares in Groveland, one corner was occupied by a branch of a Chicago bank that served that neighborhood's more affluent residents.<sup>279</sup> Across the street, a check cashing service catered to lower-income residents.<sup>280</sup> Another corner was occupied by a black-owned service station. A soul food restaurant was located on the other corner.<sup>281</sup>

As the children of the Grovelanders grew up, many were unable to replicate their parents' middle-class status.<sup>282</sup> Some did not attend college at all.<sup>283</sup> Others enrolled, but dropped out before finishing.<sup>284</sup> Several second generation Grovelanders continued to reside in the parents' homes into their adulthood.<sup>285</sup> Some of the young women bore children out of wedlock.<sup>286</sup> Others returned to their parent's homes with children after divorcing their spouses; intergenerational households were not uncommon.<sup>287</sup>

The high-paying factory jobs that supported the pioneering black families slowly disappeared as a result of automation and globalization.<sup>288</sup> When the second generation Grovelanders' inherited their

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273. *Id.* at 33.

274. *Id.*

275. PATILLO-McCOY, *supra* note 270, at 31-44.

276. *Id.* at 34.

277. *Id.* at 35.

278. *Id.* at 38, 39.

279. *Id.* at 38.

280. *Id.* at 38-39.

281. *Id.* at 39.

282. *Id.* at 47-52.

283. *Id.*

284. *Id.* at 47.

285. *Id.* at 47, 48, 52.

286. *Id.* at 47, 49.

287. *Id.* at 68-90.

288. *Id.* at 53.



deceased parents' homes, some could not afford to maintain them.<sup>289</sup> Some of the homes fell into a state of disrepair.<sup>290</sup> Others were rented to outsiders; some of the second generation residents were lured into the world of drug and crime.<sup>291</sup> Their presence was tolerated because the neighbors had known them as children. Eventually the neighborhood became the home of one Chicago's most notorious gangs.<sup>292</sup> In the end, Groveland became a mix of middle, working class, and low-income occupants. It was not as crime-ridden and impoverished as most of Chicago's inner city neighborhoods, but it was not like white, middle-class communities.<sup>293</sup>

## IX. UPSCALE ENCLAVES

There are upscale, all black neighborhoods in Dekalb County, Georgia (which is adjacent to Atlanta) and Dade County, Florida and in neighborhoods north and west of St. Louis, Missouri<sup>294</sup> and Atlanta, Georgia, which have a large and rapidly growing middle- and upper-middle income African American community.<sup>295</sup> For more than a century, the colleges in the Atlanta university system have produced generation after generation of highly educated African Americans.<sup>296</sup> Economic institutions such as black-owned banks and other business establishments have long been pillars of Atlanta's African American community.<sup>297</sup> In Cascade Heights, an upscale, African American neighborhood in Atlanta, developers constructed a gated community in which the price of homes is just under a million dollars.<sup>298</sup> There are similar enclaves of affluence in other metropolitan regions.

In *The Failures of Integration*,<sup>299</sup> Professor Sheryll Cashin examined neighborhoods located in Prince Georges County, Maryland (a Washington, D.C. suburb).<sup>300</sup> One of these was a gated, 350 acre

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289. *Id.* at 47-53.

290. *Id.*

291. *Id.* at 71-82.

292. *Id.*

293. *Id.* at 201-18.

294. SHERYLL CASHIN, *THE FAILURE OF INTEGRATION: HOW RACE AND CLASS UNDERMINE THE AMERICAN DREAM* 134 (2004).

295. Ellen Barry, *Atlanta Suburbs Bloom for Blacks*, L.A. TIMES, Feb. 27, 2004.

296. ANDREW WIESE, *PLACES OF THEIR OWN: AFRICAN AMERICAN SUBURBANIZATION IN THE TWENTIETH CENTURY* (2004).

297. *Id.*

298. *Id.*

299. CASHIN, *supra* note 294.

300. *Id.*

development that contained trophy homes with three-car garages, vaulted ceilings, glass encased foyers and elaborate entryways with Doric columns.<sup>301</sup> Unlike the neighborhood in *Black Picket Fences* in which black homeowners replaced whites, this development contained newly constructed homes where blacks were the first buyers.<sup>302</sup> The neighborhood's residents are physicians, lawyers, white-collar professionals, high level federal employees, professional athletes, and successful entrepreneurs.<sup>303</sup>

Professor Cashin explained that many upscale blacks choose all black suburbs as a result of "integration exhaustion."<sup>304</sup> The black enclaves in which they reside provide a comfortable retreat from the stresses of an integrated workplace.<sup>305</sup> The residents can relax and interact with neighbors who are like them.<sup>306</sup> They do not want to be isolated in a neighborhood in which they would be the only black family.<sup>307</sup> They do not have to fear being racially profiled by police; their expensive cars and clothing are not seen as curiosities.<sup>308</sup> Their neighbors understand the problems that African Americans experience in a society in which race still matters.<sup>309</sup> The residents are members of the same black churches, fraternities, sororities, and other social organizations.<sup>310</sup> They do not need to live next door to whites to experience self-satisfaction or personal fulfillment.<sup>311</sup> Their neighborhoods provide a stimulating and enriching social environment.<sup>312</sup>

In *Blue Chip Black*,<sup>313</sup> Professor Karyn Lacy examined the black middle-class and identified some socioeconomic divisions. Lacy divided the black-middle-class into three distinct groups: the black lower-middle-class earning less than \$50,000; the stable, core black-middle-class earning \$50,000 through \$99,999; and the elite black-middle-class, earning more than \$100,000.<sup>314</sup> She examined two majority

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301. *Id.* at 127-28.

302. *Id.*

303. *Id.* at 128.

304. *Id.* at 9.

305. *Id.*

306. *Id.* at 17-28.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 132.

312. *Id.*

313. See generally KARYN R. LACY, *BLUE CHIP BLACK: RACE, CLASS AND STATUS IN THE NEW BLACK MIDDLE CLASS* (2007).

314. *Id.* at 41.

black neighborhoods in suburban Prince Georges County and another, mostly white neighborhood in Fairfax, County Virginia.<sup>315</sup>

Lacy concluded that the racial and class composition of a black family's suburban neighborhood shaped the ways in which individuals viewed themselves and the ways in which they interacted with others.<sup>316</sup> She found that structural conditions that maintain housing segregation adversely affect opportunities for the black middle-class, especially those in the middle- and lower-middle-class.<sup>317</sup> However, the socioeconomic characteristics of the group earning more than \$100,000 closely resembled their white counterparts.<sup>318</sup>

Despite the affluence of the black residents, there are some conditions that make Prince Georges County different and less desirable than other Maryland and Virginia suburbs.<sup>319</sup> It is adjacent to low-income communities in Washington D.C. and Maryland.<sup>320</sup> It has a higher level of low-income residents than other Washington, D.C. suburbs.<sup>321</sup> The public schools in Prince Georges County have the second lowest test scores in the state of Maryland, ranking the school system just above Baltimore.<sup>322</sup> Compared to other suburban communities in Maryland and Virginia, Prince Georges County has a much higher rate of crime, a higher tax rate, and a lower level of municipal services.<sup>323</sup> High end retailers do not locate to Prince Georges County, and it does not have the restaurants, shopping, and other amenities that would normally be found in an affluent suburban community.<sup>324</sup>

## X. THE RECESSION AND REVERSE REDLINING

Blacks have been disproportionately affected by the recession. In May of 2011, the black unemployment rate was 16.2%; for whites the unemployment rate was 7.9%.<sup>325</sup>

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315. *Id.*

316. *Id.* at 72-113.

317. *Id.* at 219-26.

318. *Id.*

319. CASHIN, *supra* note 294, at 137-59.

320. *Id.*

321. *Id.*

322. *Id.*

323. *Id.*

324. *Id.*

325. Table A-2, *supra* note 115.

In 2010, 45.5% of black families owned their homes.<sup>326</sup> This was down from 49.1% in 2005 and much lower than the 71.1% of white families that are homeowners.<sup>327</sup> The decline in home ownership is attributable to the housing crisis which has disproportionately affected African Americans. Part of the problem is historic. For most of the twentieth century, redlining prevented African Americans from obtaining mortgage loans.<sup>328</sup> A recent development, reverse redlining, is essentially the opposite; minority populations are targeted by lenders who provide mortgages with higher fees and costs than loans made to similarly situated white customers.<sup>329</sup> The loans, many of which were made with insufficient regard for the borrowers' ability to make payments, have resulted in defaults, massive foreclosures, and the loss billions of dollars in home equity.<sup>330</sup>

The products that created this problem are subprime mortgages. Prior to the emergence of subprime lending, most mortgage lenders made mainly "prime loans" to borrowers with incomes and credit histories that indicated they were unlikely to default on their obligations.<sup>331</sup> In the early 1990s, technological advances in automated underwriting allowed lenders to predict with improved accuracy the likelihood that borrowers with blemished credit histories would repay loans.<sup>332</sup> Lenders viewed subprime loans as an attractive product be-

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326. U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP, ANNUAL STATISTICS: 2010, <http://www.census.gov/hhes/www/housing/hvs/annual10/ann10ind.html> (last visited June 19, 2011).

327. *Id.*

328. JACKSON, *supra* note 182, at 197.

329. Raymond H. Brescia, *Subprime Communities: Reverse Redlining, The Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis*, 2 ALB. GOV'T L. REV. 164, 173 (2009); Susan E. Hauser, *Predatory Lending, Passive Judicial Activism and the Duty to Decide*, 86 N.C. L. REV. 1501, 1511, (2008).

330. Carol Necole Brown, *Intent and Emperics: Race to the Subprime*, 93 MARQ. L. REV. 907, 959 (2010); Linda E. Fisher, *Target Marketing of Subprime Loans: Racialized Consumer Fraud & Reverse Redlining*, 18 J.L. & POL'Y 121, 142-43 (2009); Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165, 175 (2010); Winnie F. Taylor, *Eliminating Racial Discrimination in the Subprime Mortgage Market: Proposals for Fair Lending Reform*, 18 J.L. & POL'Y 263, 273 (2009); Gregory D. Squires, *Predatory Lending: Redlining in Reverse*, NATIONAL HOUSING INSTITUTE, SHELTERFORCE ONLINE, <http://www.nhi.org/online/issues/139/redlining.html> (last visited June 17, 2011); U.S. DEP'T OF HOUSING AND URBAN DEV., UNEQUAL BURDEN: INCOME AND RACIAL DISPARITIES IN SUBPRIME LENDING IN AMERICA 2000 (2009), <http://archives.hud.gov/reports/subprime/subprime.cfm>.

331. Brown, *supra* note 330, at 959.

332. John P. Relman, *Continuing the Mission to Eliminate Housing Discrimination and Segregation: Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 634 (2008).

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cause they were able to charge higher interest rates as compensation for the increased risk of default.<sup>333</sup>

With the introduction of mortgage-backed securities, banks could obtain more funding from outside investors.<sup>334</sup> The process involved pooling financial assets, such as mortgage loans, and issuing securities representing interests in a pool of assets.<sup>335</sup> Pooling prime and subprime mortgages allowed banks to obtain returns that were higher than other investments with similar risks.<sup>336</sup> It was thought that the aggregation of large numbers of prime mortgages and subprime mortgages mitigated the risk of borrower defaults.<sup>337</sup>

The growth in subprime lending began in the early 1990s.<sup>338</sup> By the early 2000s lenders dramatically increased their marketing of these products.<sup>339</sup> There were many types of “exotic” mortgage products.<sup>340</sup> One example is the “2/28 ARM,” which was shorthand for adjustable rate mortgages on which the interest rate was fixed for two years and reset to the interest rate index after the two year teaser rate expired.<sup>341</sup> Borrowers hoped that when interest rates were reset, they could afford the new payments or refinance their existing mortgages based on rising home values.<sup>342</sup>

From 2000 to 2005, housing prices rose dramatically so many borrowers viewed adjustable rate mortgages as a good bet.<sup>343</sup> A steady rise in the value of homes fueled speculation in the nation’s housing markets. Inflated housing prices sparked a building boom that rapidly increased the nation’s housing supply.<sup>344</sup> In 2006, home values started to decline and by 2008, the United States found itself in a housing

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333. *Id.*

334. Hauser, *supra* note 329, at 1512.

335. *Id.*

336. *Id.*

337. *Id.* at 1514.

338. Kathleen C. Engel & Patricia McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 *FORDHAM L. REV.* 2039, 2045 (2007).

339. *Id.* at 2095

340. *Id.* at 2040-41; Christopher L. Peterson, *Predatory Structured Finance*, 28 *CARDOZO L. REV.* 2185, 2207, 2209 (2007).

341. Michael Alio & Pablo Svisky, *Foreclosure Fallout: The Banking Industry’s Attack on Disparate Impact Race Discrimination Under the Fair Housing and Equal Credit Act*, 18 *B.U. PUB. INT. L.J.* 1, 5 (2008).

342. *Id.* at 5-6.

343. David Streitfeld, *Bottom May Be Near for Slide in Housing*, *N.Y. TIMES*, May 31, 2011, at B1.

344. *Id.*

crisis.<sup>345</sup> Supply outstripped demand and home values declined for the first time in many decades.<sup>346</sup>

In many cases, borrowers could handle the monthly payments at the “teaser” rate, but after the new interest rates went into effect, they could not afford the new payment.<sup>347</sup> Declining home prices pushed a record number of borrowers “under water,” meaning the balances owed on their mortgages were higher than the market value of their homes.<sup>348</sup> An oversupply of homes, declining home values, rising unemployment levels, and other problems significantly decreased the demand for homes.<sup>349</sup> These conditions have resulted in a massive wave of defaults and foreclosures.<sup>350</sup>

African Americans have been disproportionately affected by the housing crisis.<sup>351</sup> In one study, researchers used regression analyses to measure foreclosures in the top one-hundred U.S. metropolitan markets on measures of black, Hispanic, and Asian segregation.<sup>352</sup> They controlled for market conditions, including average creditworthiness, the extent of coverage under the Community Reinvestment Act, the degree of zoning regulation, and the overall rate of subprime lending.<sup>353</sup> They found that black dissimilarity indexes and spatial isolation were powerful predictors of foreclosures across the nation’s metropolitan housing markets.<sup>354</sup> The researchers concluded that racial segregation was an important contributing cause of the foreclosure crisis, along with overbuilding, risky lending practices, lax regulation, and the decline in home values.<sup>355</sup>

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345. *Id.*

346. *Id.*

347. Alio & Svisky, *supra* note 341, at n.5.

348. Courtney Hunter, *Reducing the Spillover Costs of Foreclosure: Boston’s Block-By-Block Approach to Saving Neighborhoods from Foreclosure Blight*, 29 REV. BANKING & FIN. L. 533, 538 (2010); Ruth Simon & James R. Hagerty, *1 in 4 Borrowers Under Water*, WALL ST. J., Nov. 24, 2009, at A1.

349. Simon & Hagerty, *supra* note 348, at A1.; see also Amy Hoak, *Top 10 Cities Where Foreclosure Rates Are Highest: Foreclosures Rose, But Hard-hit Areas Eased Slightly in 2010*, MARKET WATCH (Jan. 27, 2011), <http://www.marketwatch.com/story/top-10-cities-where-foreclosure-rates-are-highest-2011-01-27>.

350. DELINQUENCIES CONTINUE TO CLIMB IN LATEST MBA NATIONAL DELINQUENCY SURVEY (2009), <http://www.mbaa.org/NewsandMedia/PressCenter/71112.htm>.

351. *Id.*

352. Jacob S. Rugh & Douglas S. Massey, *Racial Segregation and the American Foreclosure Crisis*, 75 AM. SOC. REV. 629, 644-46 (2010).

353. *Id.*

354. *Id.*

355. *Id.*

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In *Whiteness as Property: Predatory Lending and the Reproduction of Racialized Inequality*,<sup>356</sup> the authors examined 2004 data from the Home Mortgage Disclosure Act database to determine racial disparities in lending.<sup>357</sup> They found that African Americans were less likely than whites to receive loans from regulated lenders.<sup>358</sup> They also found that regardless of lender type and income level, African Americans were more likely than whites to receive higher priced loans.<sup>359</sup>

Reverse redlining is at the center of a suit against one of the nation's largest banks.<sup>360</sup> The City of Baltimore ("Baltimore" or "the City") sued Wells Fargo Bank claiming it engaged in reverse redlining practices.<sup>361</sup> The civil action claims, among other things, that a Wells Fargo loan in a predominantly African American neighborhood was nearly four times as likely to result in foreclosure as a Wells Fargo loan in a predominantly white neighborhood.<sup>362</sup> The suit alleges that a disproportionately large percentage of Wells Fargo's high-cost loans in African American neighborhoods were refinance loans indicating a deceptive and predatory practice of encouraging minority borrowers who already had loans to refinance at excessive costs with little benefit.<sup>363</sup> Baltimore contends that this practice increased the likelihood of foreclosure and has contributed to the disproportionately high rate of foreclosures in Baltimore's African American communities.<sup>364</sup>

Baltimore also alleged that Wells Fargo's pricing practices had a disproportionate impact on African American borrowers.<sup>365</sup> It claims that Wells Fargo's African American borrowers and borrowers residing in African American neighborhoods paid more than comparable

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356. Angie Beeman, Davita Silfen Glasberg & Colleen Casey, *Whiteness as Property: Predatory Lending and the Reproduction of Racialized Inequality*, 37 CRITICAL SOC. 27 (2010).

357. *Id.* at 27.

358. *Id.* at 36-37.

359. *Id.* at 42.

360. John P. Relman, *Continuing the Mission to Eliminate Housing Discrimination and Segregation: Foreclosures, Integration, and the Future of the Fair Housing Act*, 41 IND. L. REV. 629, 638-44 (2008); *Memphis v. Wells Fargo and Baltimore v. Wells Fargo*, RELMAN, DANE, & COLFAX, <http://www.relmanlaw.com/civil-rights-litigation/cases/baltimore-wells-fargo.php> (last visited Jan. 2, 2012) (Mr. Relman's firm represents the City of Baltimore.) A suit alleging essentially the same claims has been filed by the City of Memphis Tennessee.

361. *Memphis v. Wells Fargo and Baltimore v. Wells Fargo*, *supra* note 360.

362. Third Amended Complaint for Declaratory and Injunctive Relief and Damages at 2, *City of Baltimore v. Wells Fargo*, 677 F. Supp. 2d 847 (D. Md. 2010) (No. 1.08-cv-00062-JFM), available at <http://www.relmanlaw.com/docs/Baltimore-Complaint.pdf>.

363. *Id.* at 10.

364. *Id.* at 2.

365. *Id.*

white residents of predominately white communities.<sup>366</sup> The City also claims that there was a significant disparity in the speed with which Wells Fargo loans in African American and white neighborhoods went into foreclosure.<sup>367</sup> Black homeowners went into foreclosure much faster than whites.<sup>368</sup> The City contends that the disparity in foreclosure timing showed that Wells Fargo engaged in irresponsible underwriting in African American communities.<sup>369</sup>

The suit also alleges that a significant portion of the bank's foreclosures in African American neighborhoods involved unusually risky and deceptive loan products.<sup>370</sup> Baltimore claims that Wells Fargo did not properly underwrite loans made to African Americans and did not adequately consider the borrowers' ability to repay the loans.<sup>371</sup> The loans resulted in default and foreclosure for many African American borrowers, a result that should have been anticipated at the time the loans were made.<sup>372</sup>

Baltimore also contends that the use of risky, adjustable rate mortgage products subjected African American borrowers to unfair and deceptive loan terms and has contributed significantly to the high rate of foreclosures in Baltimore's African American neighborhoods.<sup>373</sup> If Baltimore prevails, the case will provide an example of one of the largest banks in America systematically discriminating against African Americans and other minorities.

The housing crisis has been devastating for African Americans.<sup>374</sup> A PEW Research Center Report stated the median wealth of white households was twenty times that of black household, and this was the largest gap between the two groups in over twenty-five years.<sup>375</sup> Researchers at the Center for Responsible Lending found that African Americans are 47% more likely to be facing foreclosure than

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366. *Id.*

367. *Id.* at 38.

368. *Id.*

369. *Id.* at 25.

370. *Id.* at 12.

371. *Id.* at 25.

372. *Id.* at 12.

373. *Id.* at 36-37. Target marketing has also been documented by researchers. Johnson, *supra* note 330. Lenders also used advertising featuring popular minority celebrities, and they sponsored minority events. *Id.* at 171.

374. RAKESH KOCHAR, RICHARD FRY & PAUL TAYLOR, PEW RESEARCH CENTER, WEALTH GAPS RISE TO RECORD HIGHS BETWEEN WHITES, BLACKS AND HISPANICS (2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>.

375. *Id.*



### *Ordinary People in an Extraordinary Time*

whites.<sup>376</sup> 11% of African American homeowners have already lost or are likely to lose their homes compared to 7% of whites.<sup>377</sup> The researchers estimated that the lost equity resulting from lower property value will, between 2009 and 2012, cost African Americans \$194 billion.<sup>378</sup> The questionable lending practices were not limited to minorities. Millions of white homeowners were adversely affected. The scope of the damage is massive, and it inflicted injuries that threatened the entire American economy. It will likely take years for this sector of the nation's economy to recover.<sup>379</sup>

### CONCLUSION

The black middle-class has benefitted from the opportunities created by the civil rights laws of the 1960s. Over the last generation, there have been significant advances in their educational attainment levels, occupational classifications and family incomes. The proportion of blacks who are middle-class has grown significantly. However, our analysis also shows that despite its remarkable advances, the black middle-class still lags behind its white counterpart. In 2009, the wealth ratios between blacks and whites were the largest since the government began publishing this data in the 1980s.<sup>380</sup>

African Americans are segmenting along class lines. Middle-class blacks have moved to suburban communities in significant numbers. Educated, upper-middle-class African Americans residing in suburban communities have little in common with their impoverished, inner city counterparts. Some middle-class blacks reside in upscale, all black communities that are not adjacent to low-income neighborhoods. They live comfortably among people like them and do so as a matter of personal choice. However, black families with incomes under \$100,000 tend to live in inner-ring suburbs that were formerly white neighborhoods. These are often contiguous to low-income communities. This proximity means that they are exposed to the deleterious conditions that plague inner city communities.

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376. DEBBIE GRUENSTEIN BOCIAN, WEI LI & KEITH S. ERNST, FORECLOSURES BY RACE AND ETHNICITY: THE DEMOGRAPHICS OF A CRISIS, CRL RESEARCH REPORT (June 18, 2010), <http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf>.

377. *Id.*

378. *Id.*

379. See generally Rayth T. Myers, *Foreclosing on the Subprime Loan Crisis: Why Current Regulations Are Flawed and What is Needed to Stop Another Crisis from Occurring*, 87 OR. L. REV. 311 (2008) (examining the subprime loan market).

380. KOCHLAR, FRY, & TAYLOR, *supra* note 374.

The most significant impediment to black progress is the high levels of discrimination and segregation that persist in the nation's housing markets. This impairs wealth building since a home is usually a family's most valuable asset. Segregation adversely affects living conditions. Educational opportunities are limited as public schools in segregated neighborhoods invariably lack the quality of schools in white suburban communities. This is also the case for upscale, all black enclaves, which tend to be located in school districts where student test scores are lower and higher end goods and services are scarce. The current trends indicate that the black middle-class will continue to grow. Some have achieved socioeconomic parity with their white counterparts, but most others will continue to lag behind.

## CONSTITUTION DAY LECTURE

### “A Proper Objective”: Constitutional Commitment and Educational Opportunity After *Bolling v. Sharpe* and *Parents Involved in Community Schools*

MARTHA MINOW\*

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#### INTRODUCTION

*“Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”*<sup>1</sup>

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\* Dean and Jeremiah Smith, Jr. Professor, Harvard Law School. Presented as the Constitution Day speech to Howard University School of Law, Sept. 19, 2011. An earlier version of parts of this essay was presented at the Tower Hill Forum on the Bill of Rights in Wilmington, Delaware on May 2, 2011, drawing on my work in *IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* (David Kairys ed., 2010). I am grateful for Jonathan Gould’s research assistance and for the invitation from Dean Schموke.

1. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

Four years ago, the United States Supreme Court, in a case called *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>2</sup> rejected as unconstitutional two school district plans that used race in student assignments in pursuit of racially integrated public schools. Ever since, school districts and communities seeking to promote diversity within public schools have been treading treacherous water. The Court rejected two plans but did not clearly bar race-conscious means in all circumstances.<sup>3</sup> Justice Anthony Kennedy wrote the controlling opinion, as he supplied the fifth vote crucial to striking down the plans in Seattle and Louisville, but he also joined the otherwise dissenting Justices in concluding that achieving the educational benefits of diversity remains a compelling interest that school districts may pursue.<sup>4</sup> The Department of Justice is working hard on a guide to help school systems sort through the issue.<sup>5</sup> I will use this subject matter to comment on how we arrived at this moment, to suggest steps addressing the issue going forward, and to reflect on the nature of our Constitution.

## I. FROM *BROWN* TO *PARENTS INVOLVED*

When the Supreme Court ruled in 1896 that the Fourteenth Amendment offered no barrier to publicly mandated racial segregation in schools, trains, and other public settings, it approved the doctrine of “separate-but-equal.”<sup>6</sup> The “separate” never added up to “equal” in terms of resources, status, stigma. Intellectuals, lawyers, parents, and community members mounted a fifty-year movement in politics, journalism, and law to challenge the “separate-but-equal” regime. The black intellectuals behind the Niagara Movement, led by

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2. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (plurality opinion).

3. *Id.* at 748.

4. *Id.* at 782-83, 787-88.

5. Conversation with Anurima Bhargava, Chief, Educ. Opportunities Section, Civil Rights Div., United States Department of Justice (Aug. 18, 2011). The federal government on December 2, 2011 issued a guidance applying the judicial opinions in *Parents Involved* to admissions in elementary and secondary schools. OFFICE OF CIVIL RIGHTS, GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY EDUCATION SCHOOLS, available at <http://www2.ed.gov/about/offices/list/ocr/docs/guidance-ese-201111.html> (last modified Jan. 3, 2012); see U.S. Dep’t of Educ., *Dear Colleague Letter* (Dec. 2, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201111.html>. The Supreme Court subsequently granted review in *Fisher v. University of Texas*, opening a new chapter in the use of race in voluntary plans to promote educational diversity. *No. 11-345*, SUPREME COURT U.S., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-345.htm> (last visited Mar. 19, 2012).

6. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

W.E.B. Du Bois and others, joined forces with white progressives to found the National Association for the Advancement of Colored People (“NAACP”), and their legal team developed a deliberate strategy across decades to challenge “separate-but-equal”—first in state-run graduate and professional schools, then in colleges, and finally in public elementary and secondary education.<sup>7</sup> These concerted efforts demanded enforcement of the Reconstruction amendments—and the end of race-based segregation and discrimination. Winning court victories in the context of higher education, the movement secured the victory in *Brown*—declaring separate to be inherently unequal in the context of public schooling—only to face waves of strong local resistance.

The Supreme Court decided fifty-three years after *Brown*, that the Fourteenth Amendment forbade efforts by two elected public school boards to pursue racial integration by using the race of individual students as one of several tie-breakers in assigning students to oversubscribed schools.<sup>8</sup> In *Parents Involved*, Chief Justice Roberts focused on the race-conscious school assignments in explaining why four members of the Court rejected voluntary integration plans in Seattle, Washington and Jefferson County, Kentucky in 2007.<sup>9</sup> The opinion concludes: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>10</sup> Through this aphorism, for four Justices, *Brown*’s promise of equal educational opportunity became reduced to restrictions on the use of a racial identity—even in the service of equal educational opportunity. Justice Kennedy joined those who concluded that race-conscious strategies can serve a compelling governmental purpose, even though he also joined the plurality in rejecting the two plans under review.<sup>11</sup>

What happened? It is crucial to emphasize that the issue remains contested in the Supreme Court. Justice Kennedy’s separate opinion explicitly rejected the plurality’s aphoristic approach to ending discrimination.<sup>12</sup> Justice Breyer’s opinion for the four remaining Justices

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7. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (2004) (describing in detail the history of the landmark case *Brown v. Bd. of Educ.*).

8. *Parents Involved*, 551 U.S. at 701.

9. *Id.* at 701, 711. For a defense of this view, see J. Harvie Wilkinson III, Comment, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158 (2007).

10. *Parents Involved*, 551 U.S. at 748.

11. See *id.* at 701.

12. *Id.* at 788 (Kennedy, J., concurring in part and concurring in the judgment) (“The plurality’s postulate that ‘[t]he way to stop discrimination on the basis of race is to stop discriminat-

condemned the plurality's approach for threatening the promise of *Brown*.<sup>13</sup> Justice John Paul Stevens described Chief Justice Robert's reinterpretation of *Brown* as a "cruel irony" because it treats the rejection of racial exclusion in *Brown* as if it bans the racial inclusion represented by the voluntary plans at issue in Seattle and Jefferson County.<sup>14</sup> Underscoring the departure represented by Chief Justice Robert's interpretation of *Brown*, Justice Stevens concluded: "It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today's decision."<sup>15</sup> Those who challenged racial segregation in *Brown* sought the ideal of a color-blind society but understood that until it could be achieved, race-conscious strategies would be necessary and appropriate. Thurgood Marshall, in arguing *Brown*, was clear that the problem needing redress was state-

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ing on the basis of race,' [reference omitted], is not sufficient to decide these cases. Fifty years of experience since *Brown v. Board of Education*, [citation omitted], should teach us that the problem before us defies so easy a solution. School districts can seek to reach *Brown*'s objective of equal educational opportunity. The plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion. To the extent the plurality opinion suggests the Constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is, in my view, profoundly mistaken."). One federal district court recently concluded that a state university can include race as a factor in university admissions in a plan making it one of seven special circumstances, relevant to six factors used in composing an applicant's personal achievement score used in the admissions process; the court determined that the policy provides a highly individualized, holistic review of every applicant, and the method is narrowly tailored to advance the university's goal of assembling a diverse student body. See *Fisher v. Univ. of Texas at Austin*, 645 F. Supp. 2d 587, 608-09 (W.D. Tex. 2009), *aff'd*, 631 F.3d 213 (5th Cir. 2011).

13. His opinion starts by noting the resemblance between the challenged plans and plans during the prior fifty years that "represent local efforts to bring about the kind of racially integrated education that *Brown v. Board of Education*, 347 U.S. 483 (1954), long ago promised—efforts that this Court has repeatedly required, permitted, and encouraged local authorities to undertake." *Parents Involved*, 551 U.S. at 803 (Breyer, J., dissenting). Breyer concludes that the plurality opinion "undermines *Brown*'s promise of integrated primary and secondary education that local communities have sought to make a reality," *id.* at 803-04, in summarizing *Brown* this way:

In *Brown*, this Court held that the government's segregation of schoolchildren by race violates the Constitution's promise of equal protection. The Court emphasized that "education is perhaps the most important function of state and local governments." (citation omitted) And it thereby set the Nation on a path toward public school integration.

In dozens of subsequent cases, this Court told school districts previously segregated by law what they must do at a minimum to comply with *Brown*'s constitutional holding. The measures required by those cases often included race-conscious practices, such as mandatory busing and race-based restrictions on voluntary transfers.

*Parents Involved*, 551 U.S. at 804. Justice Breyer's opinion concludes: "The last half century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*. The plurality's position, I fear, would break that promise." *Id.* at 868.

14. *Id.* at 798 (Stevens, J., dissenting).

15. *Id.* at 803.

imposed racial segregation, not state use of racial classifications per se.<sup>16</sup> Nonetheless, in rejecting the two districts’ school assignment programs, the Supreme Court decision cast doubt on all efforts to pursue voluntary racial integration and in so doing, capped decades of retreat from *Brown*’s vision of racially integrated schools.

In addressing what happened and why, it is crucial to acknowledge that our Constitution offers a framework for organizing heated and ongoing debates. Its interpretation is contested and shifting; these contests and shifts both reflect and affect political and social dynamics in society. Strangely, current trends in constitutional interpretation do not acknowledge this historical fact. As a result, the ways that we have come to discuss the Constitution are themselves historical products, reflecting the contests of different ages, rather than external methods of meaning outside of time and place.<sup>17</sup>

Awareness of the interaction between judicial interpretation and practical realities animated the Justices who decided *Brown*.<sup>18</sup> Justice Felix Frankfurter warned that “nothing would be worse, from my point of view, than for this Court to make an abstract declaration that segregation is bad and then have it evaded by tricks.”<sup>19</sup> Unfortunately, the Court’s decision was evaded—by delay, subterfuge through segregative school assignment plans using proxies for race, and overt refusals to comply.<sup>20</sup> Organizations cropped up across the South to fight implementation of *Brown* and effectively mobilized commercial

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16. Thurgood Marshall is often quoted as seeking the end of state-imposed segregation; he specifically argued that “[t]he only thing that we ask for is that the state-imposed racial segregation be taken off, and to leave the county school board, the county people, the district people, to work out their own solution of the problem to assign children on any reasonable basis they want to assign them on”—in the pursuit of equal educational opportunity. See ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN *BROWN V. BOARD OF EDUCATION OF TOPEKA*, 1952-1955, at 47 (Leon Friedman ed., 1969). He continued to defend affirmative race-conscious-remedies where necessary to tackle ongoing inequality after he joined the Supreme Court. E.g., Thurgood Marshall, *A Color-Blind Society Remains an Aspiration* (Aug. 15, 1987), <http://teachingamericanhistory.org/library/index.asp?document=1144>.

17. Originalism emphasizes the intention of the drafters as the meaning of the Constitution; textualism is a form of originalism that directs the interpreter to the words and structure as understood by the drafters rather than consequences or evolving meanings; “living constitution” advocates urge attention to text and original intent but also social, political, and economic consequences, prior precedents, ethics, and prudential or pragmatic considerations.

18. See MICHAEL KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT 74-75* (2007).

19. KLUGER, *supra* note 7, at 574.

20. See Alexander M. Bickel, *The Decade of School Desegregation: Progress and Prospects*, 64 COLUM. L. REV. 193, 203-04 (1964). For a general account of resistance to implementation, see generally JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY* (2001).

and vigilante threats and retaliations against anyone who urged integration.<sup>21</sup> Virginia closed schools rather than integrate them.<sup>22</sup> Ironically, white resistance to equal opportunity for blacks contributed to the very forging of “whiteness” as a single group, overcoming decades of ethnic divisions and hierarchies.<sup>23</sup> School desegregation stalled in the South. Until 1960, 1.4 million black schoolchildren in the Deep South remained in fully segregated schools.<sup>24</sup> By 1964, integrated schooling reached only one in eighty-five black students in the eleven Southern states that had joined the Confederacy during the Civil War.<sup>25</sup>

The threat of violence—and actual violence—prevented implementation of school desegregation. Only fifteen months after *Brown*, a group of white men brutally lynched fourteen-year-old Chicagoan Emmett Till after he spoke with a white woman while visiting Mississippi.<sup>26</sup> An all-white jury acquitted the men prosecuted for the murder; international media exposure of his mutilated body helped motivate outrage and action.<sup>27</sup> The incident exposed to the world the

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21. See James N. Rhea, *A Man Has to Take a Stand: We Went South*, PROVIDENCE J. & EVENING BULL., Oct. 20, 1957, reprinted in LIBRARY OF AMERICA, REPORTING CIVIL RIGHTS: PART ONE—AMERICAN JOURNALISM 1941-1963, at 387-88 (Clayborne Carson et al. eds., 2003); Dan Wakefield, *Respectable Racism*, NATION, Oct. 22, 1955, reprinted in LIBRARY OF AMERICA, REPORTING CIVIL RIGHTS: PART ONE—AMERICAN JOURNALISM 1941-1963, at 222-23 (Clayborne Carson et al. eds., 2003).

22. *James v. Almond*, 170 F. Supp. 331, 338 (E.D. Va. 1959). The school closing law enacted in 1956 was rejected by the state supreme court in 1959; Virginia then repealed its compulsory school attendance laws, and Prince Edward County closed its schools to avoid desegregating them. See generally THE MODERATES' DILEMMA: MASSIVE RESISTANCE TO SCHOOL DESEGREGATION IN VIRGINIA (Matthew D. Lassiter & Andrew B. Lewis eds., 1998) (exploring the contentious period in Virginia history when public schools were shut down as a response to desegregation but met with moderate revolt); BENJAMIN MUSE, VIRGINIA'S MASSIVE RESISTANCE (1961) (arguing that the organization leaders in Virginia were much more extreme in their opposition to *Brown* than the general population of the state).

23. See MATTHEW PRATT GUTERL, THE COLOR OF RACE IN AMERICA, 1900-1940, at 97 (2001). The labor movement, the New Deal, and World War II helped forge “whiteness” while subordinating blacks. See generally DAVID R. ROEDIGER, WORKING TOWARD WHITENESS: HOW AMERICA'S IMMIGRANTS BECAME WHITE—THE STRANGE JOURNEY FROM ELLIS ISLAND TO THE SUBURBS (2005) (recounting how American ethnic groups went from racial hostility to becoming part of white America). Similarly, an earlier generation of Irish immigrants became “white” by embracing racism against blacks. See generally NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (1996) (describing the story of how the Irish went from being the oppressed to becoming the oppressors of blacks in America).

24. GUTERL, *supra* note 23, at 157.

25. *State Legislation to Thwart School Desegregation*, in THE CIVIL RIGHTS RECORD: BLACK AMERICANS AND THE LAW, 1849-1970, at 378 (Richard Bardolph ed., 1970).

26. See generally STEPHEN J. WHITFIELD, A DEATH IN THE DELTA: THE STORY OF EMMETT TILL (1988) (examining the death of Emmett Till).

27. Stacey Patton, *55 Years Later, Emmett Till Murder Still Haunts*, DEFENDERS ONLINE (Aug. 27, 2010), [www.thedefendersonline.com/2010/08/27/55-years-later=emmett-till-murder-still-haunts/](http://www.thedefendersonline.com/2010/08/27/55-years-later=emmett-till-murder-still-haunts/).



strict code of racial subordination enforced by vigilante violence and a corrupted legal system, and sparked the grassroots movement<sup>28</sup> to end segregation, extra-legal violence, and racism.

The Civil Rights Movement grew through the networks of black churches, the organizational and mobilization gifts of ministers, and the courage and strength of the many people, leading to federal legislation and enforcement—and constitutional change.<sup>29</sup> With Martin Luther King, Jr.’s leadership, three hundred thousand people joined the 1963 March on Washington and contributed to the adoption of the 1964 Civil Rights Act, which also reflected sympathy for the slain President John F. Kennedy and the commitment and political skills of his successor, President Lyndon Johnson.<sup>30</sup> Aided by the tools given to the federal government by the 1964 Civil Rights Act and energized by the Civil Rights Movement that pushed for it, the Department of Justice, federal judges, and public officials began to officially dismantle dual school districts, as well as desegregated parks, buses, courthouses, and hotels. This key federal statute not only authorized the Department of Justice to enforce *Brown* through litigation, but also to withhold federal funds from school systems that discriminated against

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28. See generally THE LYNCHING OF EMMETT TILL: A DOCUMENTARY NARRATIVE (Christopher Metress, ed., 2002) (telling the story of Till through narratives and news stories depicting the event that sparked the civil rights movement). When the federal Department of Justice reopened an investigation into the murder, it was a Bush appointee, Assistant Attorney General for Civil Rights, R. Alexander Acosta, who stated, “This brutal murder and grotesque miscarriage of justice outraged a nation and helped galvanize support for the modern American civil rights movement.” Press Release, U.S. Dep’t of Justice, Justice Dep’t to Investigate 1955 Emmett Till Murder (May 10, 2004), available at [http://www.usdoj.gov/opa/pr/2004/May/04\\_crt\\_311.htm](http://www.usdoj.gov/opa/pr/2004/May/04_crt_311.htm). The investigation did not produce any new charges or sanctions. Shaila Dewan, *After Inquiry, Grand Jury Refuses to Issue New Indictments in Till Case*, N.Y. TIMES, Feb. 28, 2007, at A16.

29. See ALDON D. MORRIS, THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE (1984). Some grassroots protest and politics preceded the struggles over implementing *Brown*. See generally HARVARD SITKOFF, A NEW DEAL FOR BLACKS: THE EMERGENCE OF CIVIL RIGHTS AS A NATIONAL ISSUE (1978) (tracing the individuals, institutions, and social conditions that fostered the move against racial injustice); JEFF WILTSE, CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA (2007) (examining the evolution of municipal pools and the struggles to integrate segregated pools).

30. See GARY ORFIELD, THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT (1969). President Johnson urged Congress to enact the civil rights bill as the best memorial for the slain President Kennedy. MICHAEL KLARMAN, UNFINISHED BUSINESS: RACIAL EQUALITY IN AMERICAN HISTORY 176 (2007); see, e.g., WOODROW WILSON INT’L CTR. FOR SCHOLARS, CIVIL RIGHTS, POLITICS AND THE LAW 20-21 (Philippa Strum ed., 2006) (“[Comments of Harris Wofford reporting Roy Wilkins’ comments in 1960 that Lyndon Johnson] has the most fire in his belly on civil rights” and “he knows what racism is doing to the South, corrupting the politics of the South.”). See generally WALTER F. MURPHY & JOSEPH TANENHAUS, THE STUDY OF PUBLIC LAW (1972). Johnson’s personal commitment to the issue deserves as much attention as his political acumen.

African Americans. For the first time, the nation had serious federal enforcement of *Brown*. Finally, the Supreme Court placed its authority beyond vigorous enforcement. A full ten years after *Brown*, the Supreme Court rejected evasions of the desegregation mandate and declared that the time for “‘deliberate speed’ has run out.”<sup>31</sup> The enactment of the Voting Rights Act of 1965 then profoundly altered the larger political landscape and political calculus.

Reinforced with Justices appointed by democratic presidents,<sup>32</sup> the Supreme Court, by the late 1960s, finally repudiated the delaying tactics of resisting school districts. The Court in 1968 rejected a so-called “freedom of choice” plan under which no white students elected to join the eighty-five percent of black students who remained in the historically black school.<sup>33</sup> In 1970, President Richard Nixon, a Republican, vowed he would enforce the law—producing bi-partisan support.<sup>34</sup> His staff organized white and black leaders in the seven key Southern states to plan for peaceful and orderly implementation of desegregation.<sup>35</sup> In 1971, the Supreme Court—with the participation of Justices appointed by President Nixon—authorized district courts to order comprehensive desegregation plans, including relocating grades between schools to combine different school populations,

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31. See *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 232 (1964) (“[C]losing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws.”). For details on the Prince Edward County story, see generally OLIVER HILL, *THE BIG BANG: BROWN V. BOARD OF EDUCATION AND BEYOND, THE AUTOBIOGRAPHY OF OLIVER W. HILL, SR.* (2007); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004); KLUGER, *supra* note 7; THE MODERATES’ DILEMMA, *supra* note 22.

32. From 1962 to 1967, Democratic presidents appointed Byron White, Arthur Goldberg, Abe Fortas, and Thurgood Marshall. See *Byron White: 1962-1993*, THE SUPREME COURT HIST. SOC’Y, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/byron-white-1962-1993/> (last visited Mar. 1, 2012); *Arthur J. Goldberg: Biographical Report*, PRITZKER LEGAL RES. CENTER, <http://goldberg.law.northwestern.edu/mainpages/bio.htm> (last visited Mar. 1, 2012); *Abe Fortas: 1965-1969*, THE SUPREME COURT HIST. SOC’Y, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/abe-fortas-1965-1969/> (last visited Mar. 1, 2012); *Thurgood Marshall: 1967-1991*, THE SUPREME COURT HIST. SOC’Y, <http://www.supremecourthistory.org/history-of-the-court/associate-justices/thurgood-marshall-1967-1991/> (last visited Mar. 1, 2012). In addition, although appointed by a Republican president in 1956, William J. Brennan proved a forceful leader for racial desegregation. See *Celebrating Justice Brennan*, BRENNAN CENTER FOR JUST. N.Y.U. SCHOOL OF L., [http://www.brennancenter.org/pages/celebrating\\_justice\\_brennan/](http://www.brennancenter.org/pages/celebrating_justice_brennan/) (last visited Feb. 29, 2012).

33. *Green v. Cnty. Sch. Bd. of New Kent Cnty. Va.*, 391 U.S. 430, 441 (1968).

34. LEON FRIEDMAN & WILLIAM F. LEVANTROSSER, *RICHARD M. NIXON: POLITICIAN, PRESIDENT, ADMINISTRATOR* 146 (Leon Friedman & William F. Levantrosser eds., 1991).

35. See TOM WICKER, *ONE OF US: RICHARD NIXON AND THE AMERICAN DREAM* 486 (1991) (“[T]he Nixon administration accomplished more in 1970 to desegregate Southern school systems than had been done in the 16 previous years”); George P. Shultz, *How a Republican Desegregated the South’s Schools*, N.Y. TIMES, Jan. 8, 2003, at A23.

altering attendance zones, and using racially-based school assignments and busing in a school system where most African American students still attended schools that were all black.<sup>36</sup> By 1972, the previously segregated southern schools became the least segregated in the country.<sup>37</sup> With the affirmation of the Court, school desegregation moved north.<sup>38</sup> Between 1964 and the early 1980s, black student high school graduation rates escalated, and their performance on standardized tests became much closer to the performance of white students.<sup>39</sup> Notably, and inadequately publicized, whites’ high school graduation rates and test performance also increased during the same period.<sup>40</sup> These results stemmed from the constitutional commitment expressed by the Supreme Court in *Brown*, which itself grew from a strategy of deliberate advocacy over decades supported by political and social efforts as well as court cases advanced by lawyers and committed courageous plaintiffs.

Yet, precisely when these positive results emerged, the opposition to racial desegregation surged. A majority of whites told opinion pollsters that the Johnson administration was pursuing civil rights too aggressively.<sup>41</sup> Opponents renamed desegregation as “forced busing” and protested it in many regions.<sup>42</sup> In Boston, the protests turned violent, building on an anti-busing movement launched even before the court-ordered desegregation plan started.<sup>43</sup> White families with sufficient resources fled to the suburbs or private schools.<sup>44</sup>

By the time of *Brown*’s 20th anniversary, the law itself turned away from enforcement of school desegregation. In 1973, the Supreme Court rejected a challenge to inter-district disparities in school

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36. See *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971).

37. See CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 25-30, 179 (2004).

38. See *Keyes v. Denver Sch. Dist. No. 1*, 413 U.S. 189, 219 (1973).

39. See JENNIFER L. HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 38-40 (2003) (reviewing studies); Gary Orfield, *The Southern Dilemma: Losing Brown, Fearing Plessy, in SCHOOL RESEGREGATION: MUST THE SOUTH TURN BACK?* 1, 7 (John Charles Boger & Gary Orfield eds., 2005).

40. *Id.* at 38.

41. See KLARMAN, *UNFINISHED BUSINESS*, *supra* note 30, at 190.

42. See PATTERSON, *supra* note 20; *Busing: 25 Years*, ADVERSITY.NET, [www.adversity.net/special/busing/html](http://www.adversity.net/special/busing/html) (last visited Feb. 14, 2012).

43. See generally RONALD P. FORMISANO, *BOSTON AGAINST BUSING: RACE, CLASS AND ETHNICITY IN THE 1960S AND 1970S* (1991) (detailing the sometimes violent busing protests in Boston in the 1960s and 1970s).

44. See CLOTFELTER, *supra* note 37, at 75-96.

expenditures in Texas<sup>45</sup> and set back integration by motivating whites with resources to move from poor districts.<sup>46</sup> Crucially, in 1974, the Court confined desegregation orders to district lines and forbade the inclusion of suburbs to rectify urban segregation despite the evidence in that very case of the involvement of the state in the policies producing racial segregation<sup>47</sup> in housing and real estate.<sup>48</sup> City borders would henceforth confine both desegregation plans and the enclaves of impoverished neighborhoods, themselves victimized by violence and drugs.

Preferring schools in predominantly white communities,<sup>49</sup> many white parents could cite busing as the problem, as a stand-in for concerns about inferior education, violence, and underlying racist feelings.<sup>50</sup> The racial patterns dividing residential and district areas reflect decades of practices affected and sometimes directed by law. Yet, racially separated communities could seem to be the result of individual private choices, or even economic and social forces beyond both school board action and legitimate judicial remedy. Justice Powell focused on private individual choices as the explanation for racially separated communities when he dissented from the Court's approval of a desegregation plan in 1979.<sup>51</sup> That decision followed on the heels of the Court's decision forbidding the use of quotas as a technique of affirmative action in public higher education.<sup>52</sup>

The Supreme Court over time recast *Brown* as solely a rejection of official segregation and began to draw sharp lines between official and intentional governmental segregation, which warranted a desegregation remedy, and "de facto" segregation resulting from individual choices or social practices, which was exempted from judicial rem-

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45. See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (upholding a Texas school financing system under rational basis scrutiny). The Court also allowed private discrimination to proceed outside equal protection guarantees even when the private group received public support through a state liquor license. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 174-77 (1972) (holding that an entity was a private club and no state action existed to trigger an equal protection violation).

46. See CLOTFELTER, *supra* note 37, at 90.

47. *Milliken v. Bradley*, 418 U.S. 717, 745-47 (1974).

48. See, e.g., SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 8, 32-38 (2004); KLARMAN, *UNFINISHED BUSINESS*, *supra* note 30, at 140-41.

49. See CLOTFELTER, *supra* note 37, at 90-95, 181-85.

50. See CHARLES M. WOLLENBERG, *ALL DELIBERATE SPEED: SEGREGATION AND EXCLUSION IN CALIFORNIA SCHOOLS, 1855-1975*, at 182-83 (1978).

51. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 480 (1979) (Powell, J., dissenting).

52. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307, 320 (1978).

edy.<sup>53</sup> Given historic residential patterns, legacies of racially restrictive covenants, the convergence of race and economic class, whites in the 1970s, 1980s, 1990s, and beyond could choose largely white schools by moving to the suburbs, selecting private schools, or arranging placement of their children in high academic tracks.<sup>54</sup> In urban districts, desegregation plans included or represented complex efforts to redistribute dwindling numbers of white students, and courts overtly worried that further desegregation efforts would simply spur more “white flight.”<sup>55</sup> By 1999, the Boston School committee voted to end mandatory busing in the face of a lawsuit claiming white children were discriminated against in the district’s desegregation plan.<sup>56</sup>

The Supreme Court then allowed the termination of judicially supervised desegregation plans when the “vestiges” of official racial segregation seemed remote—even if the new student assignments relied on racially separate housing patterns.<sup>57</sup> Families of color faced not only economic hurdles to move to prosperous communities with good schools; they also confronted direct discrimination in the mortgage and housing markets.<sup>58</sup>

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53. See generally Preston Cary Green III, *Can State Constitutional Provisions Eliminate De Facto Segregation in the Public Schools?*, 68 J. NEGRO EDUC. 139 (1999) (analyzing “whether state constitutional provisions can be used to compel a state to eliminate de facto segregation in public schools”).

54. CLOTFELTER, *supra* note 37, at 81-138, 181-85. From *Brown* on, the Court rejected official segregation. The question, then and now, is what about unofficial segregation: what does it communicate when it is whites resisting education with nonwhites? Racial separation of students within an ostensibly diverse school frequently occurs through tracking ostensibly on the basis of academic talent and need, but commonly reflecting past opportunities. See Jeffrey Gettleman, *The Segregated Classrooms of a Proudly Diverse School*, N.Y. TIMES, Apr. 3, 2005, § 1, at 31. *Studies indicate that students with the same test scores face different placement in academic tracks in racially correlated patterns*. JEANNIE OAKES, KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY 233 (2d ed. 2005).

55. See *Mapp v. Bd. of Educ. of Chattanooga*, 525 F.2d 169, 171 (6th Cir. 1975), *cert. denied*, 427 U.S. 911 (1976); *Calhoun v. Cook*, 332 F. Supp. 804, 806 (N.D. Ga. 1971), *vacated in part and remanded*, 451 F.2d 583 (5th Cir. 1971). On debate over causes of white flight, see David J. Armor, *White Flight and the Future of School Desegregation*, in *SCHOOL DESEGREGATION: PAST, PRESENT AND FUTURE* 187, 196 (Walter G. Stephan & Joe R. Feagin eds., 1980). See generally KEVIN M. KRUSE, *WHITE FLIGHT, ATLANTA AND THE MAKING OF MODERN CONSERVATISM* (2005) (exploring the chronology and causes of white flight in America).

56. Robert A. Jordan, *School Committee Vote an Ending that May Only Invite Resegregation*, BOS. GLOBE, July 18, 1999, at C4.

57. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712, 731, 747-48 (2007).

58. One detailed study of the Boston area explores the complex interaction among these factors. See DAVID J. HARRIS & NANCY McARDLE, *THE CIVIL RIGHTS PROJECT: HARVARD UNIVERSITY, MORE THAN MONEY: THE SPATIAL MISMATCH BETWEEN WHERE HOMEOWNERS OF COLOR IN METRO BOSTON CAN AFFORD TO LIVE AND WHERE THEY ACTUALLY RESIDE* 3 (2004), available at [http://www.bostonfairhousing.org/More\\_than\\_Money1.pdf](http://www.bostonfairhousing.org/More_than_Money1.pdf).

As the percentage of black students attending schools where the majority of other students were children of color increased across the country,<sup>59</sup> courts retreated from the role of monitoring racial separation in schools.<sup>60</sup> Large urban districts—in which seventy percent of the students are non-white and over half are poor or near poor—face higher levels of violence, disruption, dropouts, and lower test scores than suburban schools.<sup>61</sup> The gap in achievement when students are compared by race persists across all age groups, even when controlled for economic class.<sup>62</sup> Over recent decades, the population became even more diverse with growing Hispanic and immigrant populations;<sup>63</sup> during the same time, public schools in the United States grew more separated by race and ethnicity.<sup>64</sup>

The political factors affecting Court membership influenced these developments as much as shifting demographic patterns. Judges and Justices appointed by Republican presidents reflected the country's conservative political shift and the anxieties and resentments of working- and middle-class-whites.<sup>65</sup> No new Justice after Thurgood Marshall, appointed in 1967, would reach the Supreme Court through a Democratic president's nomination for twenty-six more years.<sup>66</sup> In the meantime, the Court not only turned away from desegregation, racial mixing, and integration; it also curbed the ability of agencies,

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59. See GARY ORFIELD & CHUNGMEI LEE, *THE CIVIL RIGHTS PROJECT: HARVARD UNIVERSITY, BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 20 *tbl.8* (2004), available at [http://www.whatkidscando.org/featurestories/previous\\_years/color\\_of\\_learning/pdf/Brownat50HarvardCivilRights.pdf](http://www.whatkidscando.org/featurestories/previous_years/color_of_learning/pdf/Brownat50HarvardCivilRights.pdf).

60. See generally *Freeman v. Pitts*, 503 U.S. 467 (1992) (withdrawing judicial supervision of aspects of school system after finding those aspects had achieved unitary status after historical segregation); *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237 (1991) (upholding new neighborhood assignment plans producing essentially single-race schools in a district previously subject to a school desegregation decree under the Equal Protection Clause).

61. See HOCHSCHILD & SCOVRONICK, *supra* note 39, at 25.

62. See Christopher Jencks & Meredith Phillips, *America's Next Achievement Test; Closing the Black-White Test Score Gap*, *AM. PROSPECT*, Sept.-Oct. 1998, at 44, 47. See generally Harold Berlak, *Race and the Achievement Gap*, *RETHINKING SCHOOLS*, Summer 2001, at 10; Pedro A. Noguera & Antwi Akom, *The Significance of Race in the Racial Gap in Academic Achievement*, *IN MOTION* (June 19, 2000), [www.inmotionmagazine.com/pnaa.html](http://www.inmotionmagazine.com/pnaa.html) (assessing the educational achievement gap in America).

63. See CAROLA SUÁREZ-OROZCO, MARCELO M. SUÁREZ-OROZCO & IRINA TODOROVA, *LEARNING A NEW LAND: IMMIGRANT STUDENTS IN AMERICAN SOCIETY* 1, 5 (2008).

64. See ERICA FRANKENBERG, CHUNGMEI LEE & GARY ORFIELD, *THE CIVIL RIGHTS PROJECT: HARVARD UNIVERSITY, A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 27 (2003).

65. See generally JONATHAN RIEDER, *CANARSIE: THE JEWS AND ITALIANS OF BROOKLYN AGAINST LIBERALISM* (1985) (discussing the reasons for the precarious state of liberalism in the mid 1980s).

66. President Bill Clinton successfully nominated Ruth Bader Ginsburg in 1993 after ten consecutive Justices were named by Republican presidents. See KLUGER, *supra* note 7, at 759.

private parties, and school systems to pursue them.<sup>67</sup> And it allowed local districts to use new student assignments, rezoning, and redistricting to undo racial mixing and increase segregation.<sup>68</sup> Courts since *Brown* can—and do—declare that enough time has passed since the elimination of intentional and explicit segregation to make apparent patterns of racial separation within public schools beyond the reach of judicial remedies.<sup>69</sup> Resentment expressed by many white individuals toward affirmative action plans by selective colleges and employers fueled arguments against racial classification, and legislative and judicial restrictions followed.<sup>70</sup>

This history begins to suggest how the Supreme Court could reach its decision limiting voluntary school desegregation. It also indicates that constitutional meaning in this country is not simply interpretation of words written long ago, but ongoing debates and practices in agencies, legislatures, elections, and on the streets. *Brown* came to mean one thing during the time that courts and the Department of Justice actually enforced it, increasing interracial contact in schools and raising the educational opportunities for both blacks and whites; *Brown* comes to mean something else as courts and school districts end desegregation and restrict student assignment to promote racial integration.<sup>71</sup>

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67. See generally *Alexander v. Sandoval*, 532 U.S. 275 (2001) (rejecting private right of action under civil rights statute and halting efforts to pursue educational equality without proof of intentional racial discrimination).

68. See David L. Kirp, *Interring a Dream; The Quiet Death of School Integration*, AM. PROSPECT, Aug. 12, 2002, at 17, 17 (describing the Supreme Court's denial of a request by black parents to review resegregation in Charlotte-Mecklenburg, the scene of the landmark 1971 *Swann* case). See generally Sam Dillon, *Alabama School Rezoning Plan Brings Out Cry of Resegregation*, N.Y. TIMES, Sept. 17, 2007, at A1 (explaining that black parents in Alabama are using the No Child Left Behind statute to challenge a rezoning plan that will reassign hundreds of black children to low performing schools).

69. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 115-19 (1995); *Bd. of Educ. of Okla. City v. Dowell*, 498 U.S. 237, 245 (1991).

70. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (challenging collective bargaining agreement extending to minority employees preferential protection against layoffs); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (challenging a city plan providing that a specified amount of construction contracts should be subcontracted to minority businesses). But see *Grutter v. Bollinger*, 539 U.S. 306, 394 (2003) (permitting use of race among many other factors in individualized review of applicants to public law school). See generally *Gratz v. Bollinger*, 539 U.S. 244 (2003) (explaining that affirmative action policies must be narrowly tailored in order to minimize resentment of the benefited group by those who are excluded).

71. See CLOTFELTER, *supra* note 37, at 179; HOCHSCHILD & SCOVRONICK, *supra* note 39, at 136-42; PETER IRONS, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* 289-337 (2002); WALTER STEPHAN & JAMES A. BANKS, *REDUCING PREJUDICE AND STEREOTYPING IN SCHOOLS* 50-53 (1999); Walter Stephan, *School Desegregation: An Evaluation of Predictions Made in Brown v. Board of Education*, 85 PSYCH. BULL. 217, 219 (1978). See generally

Constitutional meaning here reflects political and legal backlash against desegregation. That backlash in turn contributes to the highly abstract debate, occupying courts and commentators, about eliminating considerations of race in student assignment in order to create a color-blind society.<sup>72</sup> Neither legitimacy nor efficacy concerns explain the Court's rejection of voluntary desegregation plans enacted by school boards fully subject to the approval and disapproval of their electorates. Instead, the rejection of these voluntary plans mirrors a political and scholarly project to equate equal protection with colorblindness, to terminate affirmative action, and to attend to white anxieties in an increasingly multi-racial nation. Just as the social and political movements led up to the decision in *Brown* and its temporarily vigorous enforcement in the late 1960s through the early 1970s, the shift to rejection of racial classification expresses political, social, and intellectual movements in society and in the selection of judges and Justices.<sup>73</sup> Our Constitution is not a blueprint to be followed mechanically by a construction crew; nor are its words lashes tying judges to a mast. Our Constitution is a set of values and structures enabling and prompting ongoing debate and struggle. So for those of us who still

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Gary Orfield & Susan Eaton, *Foreword to DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* (1996) (claiming recent judicial decisions on desegregation have given up on the reformist aspects of the landmark *Brown* desegregation case: now integration is seen not as a goal but as merely "a temporary punishment for historic violations."); PATTERSON, *supra* note 20, at 158-64, 191-205 (analyzing the decisions leading up to *Brown* and the effect of the *Brown* decision on educational opportunities within both black and white communities).

72. See generally ROBERT J. COTTRILL, RAYMOND T. DIAMOND, & LELAND B. WARE, *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* (2003) (analyzing the effects the *Brown* decision on society).

73. See Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 120-21 (1975). See generally Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination*, ISSUES LEGAL SCHOLARSHIP (2003), reprinted in 58 U. MIAMI L. REV. 9, 20-24 (2004) (analyzing what kinds of constitutional limits the presumption against racial classification has imposed on race-conscious efforts to ameliorate segregation); Matthew D. Lassiter, *The Suburban Origins of "Color-Blind" Conservatism Middle-Class Conscientiousness in the Charlotte Busing Crisis*, J. URBAN HIST. 549-82 (2004) (challenging the distinction between *de jure* segregation in the South and *de facto* segregation in the North and arguing that the color-blind populism in metropolitan Charlotte helped to forge a national suburban blueprint of consumer rights, residential privileges, and middle-class racial innocence); Ian Haney Lopez, *Race and Colorblindness After Hernandez and Brown*, 25 CHICANO-LATINO L. REV. 61 (2005) (stating that insisting that race is a social construction is an insufficient rejoinder; indeed, colorblindness will increasingly embrace a constructionist conception of race); Reva Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1470-1547 (2004) (considering what kinds of constitutional limits the presumption against racial classifications imposes on race-conscious efforts to ameliorate segregation).



hope to redeem a promise of equal and full educational opportunity as a constitutional value, where shall we turn next?

## II. RECLAIMING EDUCATIONAL OPPORTUNITY AS A CONSTITUTIONAL VALUE

Let’s explore three avenues for addressing the constitutional treatment of equal educational opportunity: 1) lawyering in the trenches over the meaning of *Parents Involved*; 2) devising a doctrinal alternative to the emerging color-blind approach; and 3) political and social action as a critical element of constitutional interpretation and change.

### A. Lawyering after *Parents Involved*

Right after the decision in *Parents Involved*, it was not clear whether the decision should be decried as a major doctrinal shift or instead interpreted as a clarification of previously existing methods authorized in efforts to achieve racial integration. Over time, the second approach has dominated for the past several years. Lawyers and educators have proceeded with the view that racial diversity can still be pursued in schools. Meantime, practical action within school districts and district courts takes place to interpret, limit, and affect the meaning of the Supreme Court Justices’ conflicting views about voluntary uses of race-based assignments to promote racial integration in public schools.<sup>74</sup> The assumption that the decision in *Parents Involved* ends all such efforts is false. Instead, the decision’s meaning—like all of constitutional meaning—depends on concrete implementation, an ongoing debate, interpretation, and struggle. The Departments of Justice and Education developed guidelines that identify how post-secondary educational institutions may voluntarily use race to promote diversity; lawyers and litigants pursue cases and seek further Supreme Court review.<sup>75</sup>

Hence, efforts to maintain the integration ideal<sup>76</sup> persist with some success but only by directly challenging those who would derail

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74. See *Panelists Parse Supreme Court Rulings on School Integration*, DUKE L. NEWS (Sept. 7, 2007), [www.law.duke.edu/news/story?id=1493&n=17](http://www.law.duke.edu/news/story?id=1493&n=17).

75. Sam Dillon, *U.S. Urges Campus Creativity to Gain Diversity*, N.Y. TIMES, Dec. 3, 2011, at A1. For recent developments, see *supra* note 5.

76. For an evaluation of affirmative action as a tool for promoting integration, and an exploration of how integration can be practiced beyond affirmative action, see ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* (2010). See generally JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OP-*

it. Massachusetts successfully withstood such a challenge in the school district of Lynn on the grounds of finality. Use of students' race as a factor to promote racial integration in the district's transfer policy had already been found to serve the compelling public interest of "enabl[ing] parents to choose integrated schools over segregated ones" and "minimiz[ing] racial imbalance across the school system,"<sup>77</sup> and that decision had been upheld by the court of appeals sitting en banc.<sup>78</sup> Plaintiffs unhappy with the judgment tried to reopen the case and obtain relief from the final judgment, but they failed to show how their situation overcame the usual commitment to the finality of judgments.<sup>79</sup> This case matters in shielding one district from a challenge under the new pressure for race-blind student integration. The plaintiffs in the *Lynn* case conceded that reducing racial isolation and educating students to be citizens in a multiracial nation are important goals.<sup>80</sup> They acknowledged that under the judicially supervised plan, the district schools have vastly improved. In the *Lynn* case, the parties also stipulated that the education provided in each of the schools is comparable in quality, resources, and curriculum, and hence the plan at issue differs from affirmative action policies allocating scarce spaces in selective colleges.<sup>81</sup> These elements, made on the record, could assist in other contexts where the finality element is missing.

For communities seeking racial integration in public schools after *Parents Involved*, these steps remain constitutionally available:

1) Pursue racial integration with the use of race-neutral means—such as students' socio-economic status,<sup>82</sup> lotteries including weights for lower-achieving students, or school choice programs designed to recruit students of different races;<sup>83</sup>

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PORTUNITY IN MODERN AMERICA (2010) (showing how court rulings in the 1970s, limiting the scope of desegregation, have laid the groundwork for the sharp disparities between urban and suburban public schools that persist to this day).

77. *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 263 F. Supp. 2d 209, 215 (D. Mass. 2003), *abrogated by* 283 F. Supp. 2d 328 (D. Mass. 2003).

78. *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 5-6 (1st Cir. 2005) (en banc), *abrogated by* *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

79. *Comfort v. Lynn Sch. Comm.*, 560 F.3d 22, 27-30 (1st Cir. 2009).

80. *Neumyer*, 263 F. Supp. 2d at 213.

81. *Id.*

82. See generally RICHARD KAHLENBERG, THE CENTURY FOUND., *RESCUING BROWN V. BOARD OF EDUCATION: PROFILES OF TWELVE SCHOOL DISTRICTS PURSUING SOCIOECONOMIC SCHOOL INTEGRATION* (2007), available at <http://www.tcf.org/publications/education/district-profiles.pdf> (exploring race-neutral guidelines adopted by several school districts following the *Parents Involved* decision).

83. *Parents Involved*, 551 U.S. 789 (Kennedy, J., concurring in part and concurring in the judgment).

2) Focus on racial considerations not in individual student assignments but in overall policies, such as site selection of schools, the boundaries for school assignments with an eye to neighborhood demographics, recruitment efforts, and assessing performance, and other statistics by race;

3) Tie the use of race to the actual groups in the community—not just black and white, where the community includes Hispanics, new immigrants, or other groups;

4) Tie the use of race to specified educational goals, not merely the demographics of the community; and

5) Turn to the use of race in individual student assignments only when no other method can work to advance racial integration.<sup>84</sup>

If communities pursue these efforts with success in the eyes of parents, children, teachers, and business leaders, they will determine the meaning of the Constitution—not a plurality opinion.

#### B. Doctrinal Shift: Try Due Process

Another route for future action is to pursue a shift in legal doctrine. Legal scholarship, editorial writing, and litigation are useful tools here. Years of academic and political debate contributed to the judicial shift to a doctrine of color-blindness. Similar academic and political discussion could develop a doctrinal framework more in line with educational opportunity. If only to spur discussion about constitutional commitments rather than doctrinal tests, I explore the possibility of Fourteenth Amendment due process rather than equal protection for this purpose.

Due process memorably supplied the basis for *Brown*'s District of Columbia companion case, though there, in *Bolling v. Sharpe*, the Supreme Court relied on Fifth Amendment due process.<sup>85</sup> On the very day of the Supreme Court's landmark decision in *Brown*, the Court

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84. Chief Justice Roberts' plurality opinion in *Parents Involved* concluded that the racial classifications used in Seattle and in Louisville had minimal effects, so the policies were not necessary to creating racially integrated environments. *Id.* at 733 (“The minimal effect these [racial] classifications have on student assignments, however, suggests that other means would be effective.”). Similar concerns led Justice Kennedy to conclude that the racial classifications used in Seattle and in Louisville did not meet the law's requirement that, under strict scrutiny, race-conscious policies be narrowly tailored to meet a compelling government interest. *Id.* at 787 (“Far from being narrowly tailored, this system threatens to defeat its own ends, and the school district has provided no convincing explanation for its design.”).

85. See *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (“We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.”).

announced constitutional disapproval of government-run racially separate schools in the District of Columbia.<sup>86</sup> Because the District is not a state and its schools are federally funded, the Fourteenth Amendment equal protection rationale that the *Brown* court used to prohibit state-sponsored school segregation did not apply in the District of Columbia.<sup>87</sup> The Fifth Amendment's guarantee of due process of law binds the federal government, and the Court in *Bolling* interpreted due process to include protection of liberty to pursue an education—and found that liberty was wrongly circumscribed by government-mandated racial segregation.<sup>88</sup> That decision triggered serious debate that continues to this day about methods of constitutional interpretation.<sup>89</sup> Yet the obvious rightness of the decision has also converted questions about the decision into an uncomfortable challenge to those who could confine constitutional interpretation to strict textualism or the original intent of the framers. Moreover, debates over the analysis in *Bolling* in many ways reveal how law and practice have evolved in struggles over equality in American schooling. Due process analysis could in some respects afford a more meaningful framework for addressing racial equality and integrated schooling when compared with what has emerged in judicial treatments of these issues under Fourteenth Amendment equal protection analysis.

### 1. The Debate over *Bolling*

For some people, finding a basis for school desegregation in the Fifth Amendment amounts to making up words and ideas not present in the Bill of Rights. Supreme Court nominee Judge Robert Bork took this position. He rejected the Court's reasoning in *Bolling* and other Supreme Court decisions as political rather than judicial.<sup>90</sup>

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86. *Id.*

87. *Id.* at 498-99 (footnotes omitted) (“We have this day held [in *Brown*] that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.”)

88. *Id.* at 498.

89. See Sanford Levinson, *Symposium on Interpreting the Ninth Amendment: Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT. L. REV. 131, 147 (1988).

90. See *The Nomination of Judge Robert H. Bork To Be Associate Justice of the Supreme Court Before S. Comm. on the Judiciary*, 100th Cong. 113-14, 155, 156-57, 253, 286-87, 347-49,

Three criticisms are embedded in this view. The first centers on the absence of the specific words, “equal protection,” in the Fifth Amendment and attacks *Bolling* for wrongly inserting an “equal protection component” into that constitutional provision in order to decide the District of Columbia schools case.<sup>91</sup> The Fifth Amendment directs that “no person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>92</sup> It is echoed in the post-Civil War Fourteenth Amendment directive that “nor shall any State deprive any person of life, liberty, or property, without due process of law”; yet the Fourteenth Amendment, hard-wrought after the Civil War, continues, “nor deny to any person within its jurisdiction the equal protection of the laws,”<sup>93</sup> and this equality provision served as the focal point for the Supreme Court’s decision in *Brown*. The Fifth Amendment does not have comparable language, so how could the Court reach a similar decision for the federally run schools without similar supporting language?

The second criticism charges that the Supreme Court made up a new meaning for due process in order to ban racial segregation in District of Columbia schools. This process of invention, goes the criticism, drew the Court into the sort of undesirable due process judicial activism associated with *Lochner v. New York* (rejecting economic regulations)<sup>94</sup> and *Roe v. Wade* (rejecting restrictions on abortion).<sup>95</sup> Although those decisions relied on the Fourteenth Amendment, in each instance, the words, “due process” led Justices to strike down

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711–12, 749–51 (1987) (statement of Judge Robert H. Bork); see also ROBERT BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 83 (1990); JOHN HART ELY, *DEMOCRACY AND DISTRICT: A THEORY OF JUDICIAL REVIEW* 32 (1980); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager’s “Court-Stripping” Polemic*, 44 OHIO ST. L.J. 611, 629 n.173 (1983).

91. *C.f. Bolling*, 347 U.S. at 499 (rejecting an equal protection component in the Fifth Amendment but acknowledging that due process and equal protection are not mutually exclusive).

92. U.S. CONST. amend. V.

93. U.S. CONST. amend. XIV.

94. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (holding government interference in employment contracts unconstitutional), *overruled in part by* *Ferguson v. Skrupa* 372 U.S. 726 (1963).

95. *Roe v. Wade*, 410 U.S. 113, 164 (1973) (holding that a state criminal abortion statute that excepts from criminality only a life-saving procedure on behalf of the mother, without regard to the pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment). Apparently, Chief Justice Warren considered treating education as a fundamental right—with due process and equal protection dimensions—but lacked sufficient support from his fellow justices. See Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 222–24 (1991).

popularly enacted laws. This kind of interpretation, critics say, is judicial activism and lacks legitimacy.<sup>96</sup>

Finally, the drafters of the Fifth Amendment did not intend the words or concept of “due process” to ban officially mandated racial segregation in schools, and any interpretation to the contrary departs from original meaning. The drafters could not have intended to prohibit racial segregation in federally directed schools, as they did not even mean to forbid slavery.<sup>97</sup> This view focuses on the intention of the drafters of the Bill of Rights and mirrors arguments that the Fourteenth Amendment’s drafters never intended to prohibit racially segregated schools. According to this approach, the contemporaneous meanings and actual intention of the Constitution’s drafters should be the sum and substance of current interpretation.

There are many rejoinders to these criticisms, and each offers a window into the debates over constitutional interpretation in general. One response has bearing on all three concerns and notably addresses the first question about the absence of equal protection language in the Fifth Amendment: turning to the actual opinion of the Supreme Court in *Bolling*—let us point out that the Court never inserted “an equal protection component” into the Fifth Amendment. Instead, the Court focused on liberty, which does appear in the amendment, and reasoned: “Segregation in public education is not reasonably related to any proper objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”<sup>98</sup> This tracks the pattern of due process analysis used by courts in many other cases. The Court has construed due process to require reasons when the government restricts individual liberty and to forbid such restrictions if they lack a proper governmental purpose.<sup>99</sup> This is precisely how Justice David Souter explained *Bolling* when asked about it

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96. See DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM, 87-88 (2011). See generally Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979) (arguing for maintaining a clear distinction between the egalitarian and libertarian dimensions of the Fourteenth Amendment).

97. U.S. CONST. ONLINE, [http://www.usconstitution.net/consttop\\_slav.html](http://www.usconstitution.net/consttop_slav.html) (last modified May 20, 2010).

98. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

99. See *United States v. Salerno*, 481 U.S. 739, 745 (1987); see also *Griswold v. Connecticut*, 381 U.S. 479 (1965).

during hearings on his confirmation to the Supreme Court.<sup>100</sup> Although the Supreme Court in later decisions has suggested that the Fifth Amendment includes an equal protection norm,<sup>101</sup> it did not do so in *Bolling* itself.

The second and third critiques—that “due process” does not itself forbid governmental racial segregation and that the drafters did not so intend—press textualist and originalist modes of constitutional interpretation. As vivid and salient as those modes are, the claim that they are the sole modes of legitimate constitutional interpretations remains a minority view. That view is quickly met by the response that the framers selected broad and open-ended words as key phrases in the original Constitution and its amendments. The drafters knew what they were doing in selecting broad terms; they meant to do so to permit judicial interpretation through changing times. And ending government-imposed racial segregation in the District of Columbia schools at the same time that the Court banned the practice by the states is an excellent reminder of why text and original intent do not exhaust the tools of constitutional interpretation.<sup>102</sup>

Imagine a world in which the federal courts ban racial segregation in schools run by the states but not in schools funded by the fed-

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100. *The Nomination of Judge David H. Souter To Be Associate Justice of the Supreme Court Before S. Comm. on the Judiciary*, 101st Cong. 305-06 (1990) (statement of Judge David H. Souter).

*Bolling* is so often described as a case which held that due process has an equal protection component. In point of fact, that description of *Bolling* came later. . . . What the Court did in *Bolling* was not simply say, look, all along there was an equal protection component in due process. They said something very different. They went through a kind of fairness analysis and ultimately I have always read *Bolling* as coming to this question. We are going to apply to the Washington, DC schools the old kind of, the accepted kind of substantive due process analysis that even the conservatives accept. We are going to say is there, at the present time, a legitimate governmental object which is being served by this particular restriction, that is, the restriction on total freedom to attend schools in an integrated basis? The most interesting thing about *Bolling* is that the Court said, no, that is not a legitimate governmental objective. Hence, the Court solved the problem of segregation not by pretending that due process simply means equal protection but we never noticed it before. They solved it by doing a kind of due process analysis. They said there is no legitimate governmental objective to be served here.

101. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204-14 (1995); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 639 (1975); *U.S. Dep’t of Agric. v. Moreno*, 413 U.S. 528, 540, 543 (1973) (reading *Bolling* to offer an equal protection dimension to the Fifth Amendment).

102. Frank Michelman suggests that even if the original intention behind the Due Process Clause were to reflect a natural rights tradition, the framers of the Fifth Amendment would not have imagined prohibitions on official racial segregation. Frank I. Michelman, *Concurring in Part and Concurring in the Judgment*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION* 124, 128 n.33 (Jack M. Balkin et al. eds., 2001).

eral government.<sup>103</sup> Such a result would be incoherent, arbitrary, and unjust.<sup>104</sup> It also would neglect the impact of the Fourteenth Amendment on the Fifth Amendment itself simply as a matter of interpreting an amended text. In addition, Reconstruction-era Amendments and the social understandings producing them inevitably and appropriately affect the rest of the Constitution.<sup>105</sup> Whether defended in terms of the “living constitution” that encompasses changing attitudes or simply a description of our actual constitutional tradition in practice, the understanding of constitutional interpretation as a process articulating evolving understandings of enduring commitments now inspires democracies across the world. The interplay of history, doctrine, structure, language, intention, and ethics guides constitutional interpretation in the United States now and always has.<sup>106</sup> Embracing the due process rationale for ending segregated schooling is a useful reminder of this proud tradition.

Because of discomfort with the due process rationale in *Bolling*, some have suggested other parts of the Constitution supply the basis for banning racial segregation by the federal government. Some look to the Citizenship Clause, Bill of Attainder Clauses, or Titles of Nobility Clause,<sup>107</sup> returning to words for authority. Jack Balkin argues that the Reconstruction Republicans believed that the Fifth Amend-

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103. See Wendell E. Pritchett, *A National Issue: Segregation in the District of Columbia and the Civil Rights Movement at Mid-Century*, 93 GEO. L.J. 1321, 1321 n.2 (2005) (emphasizing the political pressure for the result in *Bolling*). While Michael McConnell suggests that the framers of the Fourteenth Amendment intended to impose restrictions on states that they did not want to impose on the federal government, Michael W. McConnell, *Concurring in the Judgment, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION*, *supra* note 102, at 158, 166, this is debatable and, even if persuasive, would supply another ground for questioning sole reliance on drafter intent. And while Richard Primus stresses that courts seldom grant constitutional relief to plaintiffs charging the federal government with racial discrimination, seldom is not never—and the emergence of statutory bans on race discrimination by the federal government has made reliance on the Constitution unnecessary in that context but not impossible. Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 981-82 (2004).

104. That is not to say that *Bolling* was met with acclaim; there was plenty of resistance to desegregating the Washington, D.C. public schools. See Lisa Cozzens, *School Integration in Washington, D.C.: Moving Toward Desegregation*, <http://www.watson.org/~lisa/blackhistory/school-integration/washdc/deseg.html> (last modified Jan. 12, 1995).

105. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* xiii (2000); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409-13 (1995).

106. See PHILIP C. BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 10-12 (2006); LAURENCE TRIBE & MICHAEL DORF, *ON READING THE CONSTITUTION* 3 (1991).

107. See, e.g., *Drew S. Days, III, Concurring, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION*, *supra* note 102, at 92. Akhil Reed Amar, *Intratextualism*, 112 HARV. L.



ment’s Due Process Clause guaranteed equal protection in the context of federal governmental action, but saw a need to spell out an equal protection guarantee with regard to the states.<sup>108</sup> These are imaginative efforts to scour the language of the Constitution to find alternatives to the due process basis for *Bolling*.

Yet, these creative arguments can make no claim to discerning the original intent of the framers. Yet another conventional form of constitutional analysis is relevant here and supports the due process basis: looking to precedent. There is a highly relevant precedent in which the Supreme Court applied the Fifth Amendment to racial segregation and called for the kind of searching inquiry pursued later in *Bolling*. That precedent, however, has a less than stellar reputation in large measure because the Court ended up permitting the racial practice.<sup>109</sup> The case is *Korematsu v. United States*, where the Supreme Court considered and rejected a challenge to the internment of Japanese and Japanese-Americans during World War II.<sup>110</sup> Although the Court ended up deferring to war-time military necessity, it also made clear that the Fifth Amendment calls for vigilant scrutiny of racial prejudice.<sup>111</sup> Similarly, as David Bernstein argues, due process precedents that remain “good law”—precedents such as *Meyer v. Nebraska*,<sup>112</sup> *Pierce v. Society of Sisters*,<sup>113</sup> and *Buchanan v. Warley*<sup>114</sup>—supply a basis for reading the Fifth Amendment to reject segregated schooling, even if their association with *Lochner* makes them unat-

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REV. 747, 766-69 (1999); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1297 n.247 (1995).

108. JACK M. BALKIN, *LIVING ORIGINALISM* 253 (2011).

109. See Peter J. Rubin, *Taking Its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 VA. L. REV. 1879, 1879-81 (2006).

110. *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (discussing the internment removing and detaining in harsh barracks of large numbers of American residents and citizens from their homes, their property, and their livelihoods). Ken Karst similarly turns to the Court’s decision in *Hirabayashi v. United States*, 320 U.S. 81 (1943) (assessing curfew applied to an ethnic group during wartime) as analogous to *Bolling*. Kenneth L. Karst, *The Fifth Amendment’s Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 545-46 (1977).

111. *Korematsu*, 323 U.S. at 216.

112. *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that the Nebraska law forbidding the teaching of a foreign language in the state of Nebraska was unconstitutional under the Due Process Clause of the Fourteenth Amendment).

113. *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (affirming the decrees for the plaintiffs to enjoin the defendant from enforcing the Compulsory Education Act because the Act’s requirement that each child at a certain age to attend a public school violated the Due Process Clause of the Fourteenth Amendment).

114. *Buchanan v. Warley*, 245 U.S. 60 (1917) (holding that the alienation of property to a person of color is not part of the state’s police powers but a direct violation of the Due Process Clause of the Fourteenth Amendment).

tractive to some people.<sup>115</sup> Lisa Crooms points out that just as a parent has a constitutional right to choose German instruction for his or her child, a parent should have a constitutional right to choose racially integrated classrooms to nurture their child's development.<sup>116</sup> Ryan Williams argues that substantive meanings of Fifth Amendment due process, though absent at the time of its drafting, were well developed by the courts prior to the Civil War.<sup>117</sup> Precedents express constitutional meanings in a process of decision-making embedded in the context of particular cases and contexts; this process has produced interpretations of the due process that reject racial segregation in federally-run schools.

The legal discussion about student assignments based on race could shift to due process even when states are involved, since the Fourteenth Amendment Due Process Clause would apply. Doing so would focus—appropriately—on racially segregated schools as an arbitrary deprivation of liberty, unrelated to a proper government objective. That issue deserves central attention once more in formal and informal practices affecting students' access to education.

## 2. Making Restrictions on Liberty the Focus

Using a due process framework could allow courts and advocates to focus productively on the liberty of each student to pursue equal educational opportunities with access to diverse student bodies. This approach could disentangle the analysis from the preoccupation with racial classification that has emerged under the Equal Protection Clause. Doctrinal frameworks are meant to implement, not to eviscerate, constitutional meaning. Constitutional law in our system develops as advocates and courts apply the language and structure of the text to concrete problems and draw on prior judgments in an evolving process of interpretation articulating a framework for analysis. A doctrinal shift can highlight dimensions of constitutional meaning obscured by particular strands of case law.

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115. David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 *GEO. L.J.* 1253, 1282 (2005).

116. Thanks to Lisa Crooms, Professor, Howard University School of Law, for this wonderful point, made on Sept. 19, 2011; see also *Comfort ex rel. Neumeyer v. Lynn Sch. Comm.*, 263 F. Supp. 2d 209, 215 (D. Mass 2003) (discussing the parents' ability to choose which school their children attend).

117. Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 413-14 (2010).

In the neighboring context of religion and schooling, a recent doctrinal shift has altered the course of constitutional law. Recent developments in the legal treatment of public aid to religious schools and public school treatment of religion have changed as advocates have injected equality notions—echoing *Brown*—to reframe issues previously conceived in terms of separating church and state. Instead of a “wall” between religion and government, the emerging articulation of constitutional meaning calls for neutral—equal—treatment. In the context of public schools, symbols of religious holidays may be introduced as long as there is even-handed treatment of different religions.<sup>118</sup> Public dollars may reach private religious schools as long as these, too, reflect an even-handed, neutral approach.<sup>119</sup> A principal architect of this shift from insistent separation to equal treatment is Michael McConnell, whose scholarship and advocacy argued against separate spheres of public and private, with religion relegated to the private, and instead advocated full and equal rights for religious individuals in the public sphere.<sup>120</sup> McConnell’s extensive work on the

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118. See generally *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006) (holding that a holiday display in public schools was constitutional because it had a secular purpose of promoting pluralism and tolerance, did not have the primary effect of advancing or inhibiting religion, and did not create an excessive entanglement between church and state. For the Supreme Court’s jurisprudence on this issue, see generally *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005) (holding that government-sponsored displays of the Ten Commandments in county courthouses violated the Establishment Clause); *Van Orden v. Perry*, 545 U.S. 677 (2005) (holding that the Ten Commandments monument donated to state government could be displayed at the Texas State Capitol without violating the Establishment Clause); *Allegheny Cnty. v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989) (holding that the display of a crèche on municipal property ran afoul of the Establishment Clause because the primary effect of the display was to advance religion, but accepted the constitutionality of other, less overtly religious displays); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holding that holiday decorations on municipal property were constitutional because they had a legitimate secular purpose and did not attempt to advocate a particular religious message); *Stone v. Graham*, 449 U.S. 39 (1980) (holding that a Kentucky statute requiring the posting of a copy of the Ten Commandments in a public school classroom ran afoul of the Establishment Clause because the purpose of the policy was primarily religious).

119. See generally *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (holding that the Ohio Pilot Scholarship Program containing a voucher portion was neutral in its application, not violating the Establishment Clause); *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995) (concluding that the funding of the organization by the university does not violate the Establishment Clause because of the neutrality of the program); *Widmar v. Vincent*, 454 U.S. 263 (1981) (affirming the 8th Circuit’s opinion of the university’s regulation of excluding religious groups from the university’s open forum because the primary effect of the policy was not to advance religion but promote the neutral objective of developing students).

120. See generally Michael W. McConnell, *Religious Participation in Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) (presenting an argument for doctrinal change that is not government prayer as a solution to the debate between more or less religion in the public sphere); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1414 (1990) (utilizing the “major philosophical, legal, and historical sources that preceded the free exercise clause of the first amend-

Fourteenth Amendment and racial desegregation<sup>121</sup> informed his successful advocacy of an equality dimension for the rights for religious individuals.

As counsel for students seeking state university funding for their Christian publication, McConnell successfully persuaded five Justices of the Supreme Court to focus on the unequal treatment of different student groups arising when the University of Virginia denied funding for the religious publication while subsidizing other student publications.<sup>122</sup> The Supreme Court rejected as unconstitutional the exclusion of a religious student newspaper from eligibility for funding by the state university; such exclusion amounted to impermissible viewpoint discrimination under the guarantee of freedom of speech.<sup>123</sup> And, in line with the Court's emerging focus on neutrality, nondiscrimination, and equal treatment in assessing claims under both the Establishment and Free Exercise Clauses of the Constitution,<sup>124</sup> the Court has started to analyze challenges to public aid to religious schools by asking whether the aid comes through a general program with neutral, secular criteria that neither benefit or disadvantage relig-

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ment" as a means of determining the meaning understood by the drafters); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000) (arguing that "singling out religion" is entirely consistent with the constitutional tradition embodying the concept of separation of church and state); Michael W. McConnell, *The Selective Funding Problem: Abortions and Religious Schools*, 104 HARV. L. REV. 989 (1991) (discussing the problem of select funding in regards to public school education and abortion). This view should be distinguished from the conception that religion should never be treated differently from other personal views or commitments. Christopher Eisgruber and Lawrence Sager argue that equality would forbid the government from treating religion differently from any other category even if that difference takes the form of a preference or accommodation. See generally Christopher L. Eisgruber & Lawrence G. Sager, *Mediating Institutions: Beyond the Public/Private Distinction: The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994) (arguing that the "privilege view of religious exemptions is normatively unjustified and unattractive . . . while the protection view is both justified and attractive. . .").

121. See generally Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995) (arguing that the consensus' belief that Brown is inconsistent with the original interpretation of the Fourteenth Amendment is wrong); Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J. L. & PUB. POL'Y, 457 (1996) (discussing the notion that Brown is within the original understanding of the Fourteenth Amendment).

122. See *Rosenberger*, 515 U.S. at 822; see also Transcript of Oral Argument at 13, *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995) (No. 94-329), 1995 WL 117631.

123. *Rosenberger*, 515 U.S. at 832. See Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) for a thoughtful analysis of the emerging judicial opinions.

124. See generally Derek H. Davis, *A Commentary on the Supreme Court's "Equal Treatment" Doctrine as the New Constitutional Paradigm for Protecting Religious Liberty*, 46 J. CHURCH & ST. 717 (2004), available at 2004 WLNR 15660289 (discussing the Supreme Court's emphasis on neutrality in resolving government action challenged under the Establishment Clause).

ion.<sup>125</sup> Thus, in the landmark 2002 case of *Zelman v. Simmons-Harris*, the Court upheld a voucher program enabling parents to select a private parochial school for their children.<sup>126</sup> The Court similarly allowed the use of public dollars to pay for books, computer software, and other secular materials for use in a private religious school.<sup>127</sup> This shift in church-state jurisprudence—whether one endorses it or criticizes it—illustrates that doctrinal reframing, when combined with steady advocacy, can alter the course of constitutional interpretation.

What if we came to address issues of race in school through the due process lens expressed in *Bolling*? Then, as in Lynn, Massachusetts, school systems and courts could focus on the liberty of parents “to choose integrated schools over segregated ones.”<sup>128</sup> New risks of racial separation—such as the documented overrepresentation of children of color in special education, detention, and in lower academic tracks—could also receive intensive scrutiny as potential deprivations of liberty.<sup>129</sup> The courts have acknowledged these risks in the past, notably in the District of Columbia case of *Hobson v. Hansen*,<sup>130</sup> through Fifth Amendment analysis.<sup>131</sup>

A due process framework could also illuminate and instruct emerging debates over single-sex education. Proponents of gender equality at times oppose and at times defend all-girl instruction as a kind of remedial, empowerment measure.<sup>132</sup> The 1964 Civil Rights Act and Title IX of the 1972 Education Amendments enlarged

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125. See *Zelman v. Simmons-Harris*, 536 U.S. 639, 649 (2002).

126. *Id.* at 644.

127. *Mitchell v. Helms*, 530 U.S. 793, 801-02 (2000) (plurality opinion) (rejecting Establishment Clause challenge because the program was generally available).

128. *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 263 F. Supp. 2d 209, 215 (D. Mass. 2003).

129. Minority students are overrepresented in special education classes, low academic tracks, and detention, creating a sort of internal segregation in some schools. See MARTHA MINOW, IN *BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* 82, 202-03 n.171 (David Kairys ed., 2010)

130. *Hobson v. Hansen*, 269 F. Supp. 401, 469 (D.D.C. 1967).

131. *Id.* at 443. The court in its 1967 decision in *Hobson v. Hanson* noted that the track system was approved just two years after the decision in *Bolling v. Sharpe*, and had the taint of segregationist intent. *Id.* at 442. The tracking system had to be abolished, ruled the federal court, not because it was the result of intentional racial segregation but because its effects violated the guarantees of the Fifth Amendment. *Id.* at 442. The tracking assignments used tests lacking empirical basis, matching socio-economic and racial identity, confining most of the black children to the lower tracks, and denying them access to honors courses or opportunity to move to other tracks—amounting to a violation of the Fifth Amendment. *Id.* at 447. The court there did also rely on the separate-is-inherently-unequal reasoning of *Brown*. *Id.* at 496.

132. See Kimberly J. Jenkins, *Constitutional Lessons for the Next Generation of Public Single-Sex Elementary and Secondary Schools*, 47 WM. & MARY L. REV. 1953, 2041 (2006); Nancy Levit, *Embracing Segregation: The Jurisprudence of Choice and Diversity in Race and Sex Separatism in Schools*, 2005 U. ILL. L. REV. 455, 485 (2005); Denise C. Morgan, *Anti-Subordination*

*Brown's* rejection of state-mandated exclusions to include discrimination on the basis of sex.<sup>133</sup> Advocates used law to equalize resources across programs for boys and girls and also to open up male-only settings. Yet, Title IX expressly excluded from its coverage the admissions policies at secondary schools<sup>134</sup> and public colleges traditionally enrolling only students of one sex.<sup>135</sup> The federal courts have allowed as a constitutional matter the creation of public schools for students of only one sex.<sup>136</sup>

New arguments for single-sex public schools mounted in the late 1980s with a focus on opportunities for black boys.<sup>137</sup> The Supreme Court has rejected the exclusion of women from a state military academy<sup>138</sup> while leaving open the possibility of single-sex schooling if comparable opportunities exist for any individual of any sex.<sup>139</sup> The federal government has issued a regulation promoting single-sex public schools.<sup>140</sup>

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*Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL. F. 381, 401 (1999).

133. Title IX was renamed in 2002 for its lead drafter, Representative Patsy Mink (D-HI). *Senate Adopts Resolution to Cite Title IX in Honor of Congresswoman Patsy T. Mink*, DANIEL AKAKA: U.S. SENATOR FOR HAWAII (Oct. 11, 2002), <http://akaka.senate.gov/press-releases.cfm?method=releases.view&id=7c3e9307-8948-46fa-bcfa-f6e60f8e0f5f>.

134. See 20 U.S.C. §1681(a)(1) (2006).

135. See *id.* §1681(a)(5).

136. *Vorchheimer v. Sch. Dist. of Phila.*, 532 F.2d 880, 881 (3d Cir. 1976), *aff'd* by an equally divided court, 430 U.S. 703 (1977). A state court rejected the exclusion of girls from Philadelphia's selective Central High School, while leaving in place Girls' High. MINOW, *supra* note 129, at 53, 60.

137. See Charles Vergon, *Male Academies for At-Risk Urban Youth: Legal and Policy Lessons from the Detroit Experience*, 79 W. EDUC. L. REP., 351, 351-52 (1993); Gregory Huskisson, *Preserving Manhood Civic, Political Leaders Unite to Rescue Young Black Males at Risk*, DET. FREE PRESS, Jan. 29, 1991, at 1B. For these references and other insights about the situation, I read Jia Michelle Cobb, *Resurrecting Civil Rights Litigation as a "Problem-Solving" Tool: The Lawyers' Role in Garrett v. Board of Education* (Spring 2008) (unpublished manuscript, Harvard Law School) (on file with author). See also RHONDA WELLS-WILBON & SPENCER HOLLAND, *SOCIAL LEARNING THEORY AND THE INFLUENCE OF MALE ROLE MODELS ON AFRICAN AMERICAN CHILDREN*, in PROJECT 2000, QUALITATIVE REPORT 6, no. 4 (2001).

138. *United States v. Virginia*, 518 U.S. 515, 535-38 (1996).

139. *Id.*

140. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance-Received*, 67 Fed. Reg. 31,098 (May 8, 2002) (to be codified at 34 C.F.R. pt. 106). *Single-sex classes*: The Title IX statute generally prohibits sex-based discrimination in education programs or activities receiving Federal financial assistance. Specifically, it states that no person in the United States, on the basis of sex, can be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, 20 U.S.C. §1681 (2006). Section 1681(a) of Title IX contains two limited exceptions relating to classes or activities within primary and secondary schools that otherwise are coeducational. Subsection 1681(a)(7)(B) of Title IX exempts any program or activity of any secondary school or educational institution specifically intended for the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference or for the selection of students to attend such a conference. Subsection

Equal protection analysis offers some resources here, but does not precisely focus on the potential deprivation of liberty for a girl to pursue the same educational opportunity as a boy. Nor does it fully address confinement of an individual to restrictive stereotypes or the deprivation of the liberty to learn in a co-educational environment. Some single-sex schools have admirable, powerful missions while others reflect confining restrictions. A Louisiana middle school proposed single-sex classes based on stereotypes of boys as hunters and girls as mothers, but the American Civil Liberties Union threatened suit, and the plan halted.<sup>141</sup> The Supreme Court has directed searching inquiry into any plan for gender separation in instruction under the “exceedingly persuasive justification” rationale as required in the Virginia Military Institute case.<sup>142</sup> Note how this is much more like the Fifth Amendment reasoning in *Bolling* than the Supreme Court’s “separate is inherently unequal” rationale in *Brown*. Attending to the liberty of the individual may offer a way out of the tangle of classifications and stereotypes that have marked debates over single-sex education.<sup>143</sup>

### C. Political and Social Action

The third step, going forward, is to ignite political and social action at local levels and nationally. Key constitutional decisions affecting educational opportunity reflect doctrinal frameworks articulated by advocates but also political and social movements and debates. For *Brown*, NAACP advocacy for decades before the decision and mass

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1681(a)(8) of Title IX states that the law does not preclude father-son or mother-daughter activities at educational institutions. However, if those activities are provided for students of one sex, opportunities for reasonably comparable activities must be provided for students of the other sex. Accordingly, these activities are permitted on a single-sex basis if the requirements of the statute are met.

141. See Caryl Rivers & Rosalind C. Barnett, *The Difference Myth*, BOS. GLOBE, Oct. 28, 2007, at F1.

142. *Virginia*, 518 U.S. at 531.

143. Equal protection analysis now demands an exceedingly persuasive justification for single-sex instruction, see *Virginia*, 518 U.S. at 531, but maintains the focus on the group characteristic rather than the individual. Given their different origins and developments, racially-segregated schooling and single-sex schooling have different meanings. One can imagine for single-sex education, strong arguments for the liberty to learn in a co-education environment and also strong arguments for learning in single-sex settings for education remedying historic disadvantage for girls or overcoming special disadvantages experienced by boys coming from households without fathers. In the context of race, the liberty to be educated in an integrated setting is normatively compelling, but history has rejected claims of white students to be educated in segregated settings, even if they assert—as many white parents and politicians did—that segregated schooling is their optimal learning environment—for that segregation required and perpetuated subordination of black children.

marches, legislation, and concerted social change for twenty years afterwards were essential to its articulation and enforcement. The political and social movements against affirmative action generated intellectual resources and judicial decisions that reversed the nation's course, ending school desegregation enforcement and halting even voluntary desegregation after the Court's decision in *Parents Involved*. The 2002 Supreme Court decision approving the use of school vouchers to support religious schools in Cleveland reflected a movement self-consciously modeled on the NAACP's school desegregation effort that combined litigation with media, organizing, and intellectual work, according to Clint Bolick, one of its leaders.<sup>144</sup> So many people are necessarily involved in implementing and shaping the norm of education opportunity over time: not just judges and litigators but also legislators, public officials, administrators, teachers, parents, and pundits. The language of judicial decisions matters to the work of all of these others, but here it is crucial to resist any assumption that courts alone define constitutional meaning. The rhetoric sometimes present in judicial opinions should not convince society that the Constitution's meaning is natural, outside of human struggle and historical change.

#### CONCLUSION

I have suggested three avenues for addressing the constitutional treatment of equal educational opportunity: 1) lawyering in the trenches over the meaning of *Parents Involved*; 2) devising a doctrinal alternative to the emerging color-blind approach; and 3) political and social action as a critical element of constitutional interpretation and change. Despite grave setbacks and disappointments for those seeking racial equality in educational opportunity, the constitutional basis for educational opportunity has prevailed and grown. It is this potential for enlargement—for deepening an ideal and forging its institutional reality—that is our constitutional heritage. It is a heritage of struggle and disagreement. When John Davis, representing South Carolina in *Brown*, defended segregated schools, he made this argument:

May it please the Court, I think if the appellants' construction of the Fourteenth Amendment should prevail here, there is no doubt in my mind that it would catch the Indian within its grasp just as much as the Negro. Should it prevail, I am unable to see why a state

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144. See MINOW, *supra* note 129, at 118-19.



would have any further right to segregate its pupils on the ground of sex or on the ground of age or on the ground of mental capacity.<sup>145</sup>

Davis correctly predicted effects of *Brown* in these other domains, although he erroneously thought of this as a persuasive slippery slope argument against ending racial segregation. Davis was right in recognizing how *Brown* would open equal educational opportunity arguments for all students and challenge not only racial but other forms of exclusion and discrimination. *Brown* represents and inspires decades of concerted action to realize a constitutional vision of educational opportunity for each individual, regardless of the language spoken at home, national origin, immigration status, gender, disability, religion, or race. Over one-hundred years—starting with the advocacy leading up to and then following *Brown*—constitutionally-founded educational opportunity has grown as an American ideal. Inspired by that ideal, people have altered practices on that ground. More work remains to make the promise real. The Constitution, in this process, is not a blueprint, simply waiting for construction along pre-planned lines, nor a promissory note, with specific terms redeemed by the generations following the framers; nor is it lashes tying later generations to a mast in order to resist temptations of current policies. The history I have recounted does not match the abstract legal debate over whether the explicit language, or the intention of the framers, offer the sole guides to constitutional meaning. These are important elements but not the sole ingredients of constitutional interpretation. Other ingredients include precedents, doctrinal articulations forged in the interaction between litigants and judges, political debate and elections, judicial selection, intellectual conceptions, and social movements.

If a metaphor is needed, try this one: the Constitution is a seed of culture, made of the materials from the past, cultivated in the present, and if well cared-for, lasting indefinitely and available the next time we are ready to make something of it.<sup>146</sup> Making constitutional meaning is an ongoing task in which we all have a part to play.

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145. See *BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT* 51 (Leon Friedman, ed. 2004).

146. The phrase comes specifically from the making of sour dough bread. PETER REINHART & RON MANVILLE, *THE BREAD BAKER'S APPRENTICE: MASTERING THE ART OF EXTRAORDINARY BREAD* 230 (2001).



## NOTE

# Burden Shifting and Faulty Assumptions: The Impact of *Horne v. Flores* on State Obligations to Adolescent ELLs under the EEOA

MARIA-DANIEL ASTURIAS\*

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*“Hey, Ms. A.?” Agustín,<sup>1</sup> a fifteen-year-old high school sophomore in baggy jeans and a white t-shirt with red designs scrawled across it, is seated in the converted closet that is my office in this east San Francisco bay area high school where I work as an English Learner<sup>2</sup> Specialist. Agustín is sheepish in an arrogant way, hunched and yet posturing—the way of teenage boys. “You know that thing they talk about,” he asks me, “‘changing your life’? How do you do that? How do you change your life?”*

*Agustín is a student in our English Learner program, the program I have been hired to coordinate. Of the nearly 2,000 students in our high school, nearly one quarter are currently classified as English Learners. Because he wears red, his teachers often assume he is a gang member and that he “just doesn’t care.” Thus, his teachers are able to write him off as a student beyond the realm of their responsibility. But he is not a gang member. He wears red because he has to, because he is Latino and lives in a city where young Latino men too often have to choose whichever color is the dominant one in their neighborhood. For Agustín’s neighborhood that color is red—the neighborhood controlled primarily by Norteños.<sup>3</sup>*

*And here he is, asking me a question to which I no longer seem to have an answer. “How do I change my life?” Usually, the answer to that question is “through education.” But our education system has not*

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1. This is not his real name.

2. The terms English Language Learner (“ELL”), English Learner (“EL”), and Limited English Proficient (“LEP”) are used interchangeably to refer to students who, upon entry into U.S. schools, list a language other than English as their primary or home language. See *Developing Programs for English Language Learners: Glossary*, U.S. DEP’T, EDUC., OFF. C.R., <http://www2.ed.gov/about/offices/list/ocr/ell/glossary.html> (last modified Mar. 16, 2005). For the most part, in more modern literature and cases, these students are referred to as English Language Learners (“ELL”s) or English Learners (“EL”s). For the purposes of this Note, I refer to this group of students as ELLs unless the source cited has referred to the class of students by one of the other terms.

3. See *February 2012-Court Orders Preliminary Injunction in “Phase I” of Lawsuit Against Norteños Gang*, OAKLAND CITY ATT’Y (Oct. 2011), <http://www.oaklandcityattorney.org/notable/Nortenos%20injunction.html>.

## *Burden Shifting and Faulty Assumptions*

*served Agustín. He has been designated as an English Learner since he first entered school—but he was born in the United States. And yet he still has been unable to meet the requirements for reclassification as English proficient.*

*“Once they get to high school, it’s just too late to do anything for them.” I have heard this excuse countless times in my years as a public high school teacher—from my friends, family members, and colleagues. There seems to be a misconception that once kids reach adolescence, if they have not yet been reached through education, all hope for them is lost. A recent Supreme Court decision seems to affirm this belief.*

### INTRODUCTION

At the 2010 Brown Lecture in Education Research, Professor Kenji Hakuta<sup>4</sup> stated, “language is the currency of education.”<sup>5</sup> In public schools in the United States, the dominant language of education is English. Whether the academic subject be math, science, language arts, or history, students need to be proficient in the language of instruction to be able to comprehend a lesson, to ask questions for clarification, or to express what they know; it is through language that we exchange ideas. And while the population of the United States grows increasingly diverse, the nation has yet to successfully address the lack of English proficiency of so many of our students. Without the ability to effectively utilize the English language as currency, students are at a supreme disadvantage. If it is also true, as the adage goes, that “knowledge is power,” then failure to overcome language barriers for a growing population of America’s English Language Learners (“ELLs”) will leave them powerless. Despite the widely-held belief that education can provide opportunities where the greater society has not, students like Agustín will be relegated to second-class citizenry.

While the Supreme Court has yet to declare education to be a fundamental right, the fundamental importance of the right to an equal educational opportunity for all students regardless of their ethnicity, race, disability status, or gender, remains a right recognized by the Court.<sup>6</sup> There appears, however, to be a disconnect between the recognition of this right and its enforcement. The right to a free

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4. Professor Kenji Hakuta, Keynote Address at the Seventh Annual Brown Lecture in Education Research (Oct. 28, 2010).

5. *Id.*

6. *See Plyler v. Doe*, 457 U.S. 202, 221-23 (1982).

public education extends to both elementary and secondary students, and the diminishment of the right to an equal educational opportunity as a child reaches adolescence has not been supported by the law until recently.

The debate over the extent of the obligation of educational agencies toward ELL students has been played out in our federal courts, with ELLs only rarely achieving successful results.<sup>7</sup> The reasons for this are complex and beyond the scope of this Note.<sup>8</sup> Nevertheless, despite recognition of an unacceptable gap between ELLs and their English-fluent counterparts, as well as clear deficiencies in school districts' ability (and at times willingness) to sufficiently improve proficiency in English for ELLs, courts have demonstrated a reluctance to second-guess the policy determinations made by state and local educa-

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In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the *Equal Protection Clause*: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." *Wisconsin v. Yoder* [citation omitted]. Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the *Equal Protection Clause*.

What we said 28 years ago in *Brown v. Board of Education* [citation omitted] still holds true:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

*Id.* at 221-23 (emphasis added).

7. See, e.g., *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007, 1017, 1021 (N.D. Cal. 1998), *aff'd sub nom. Valeria v. Davis*, 307 F.3d 1036 (9th Cir. 2002) (noting that Congress provided no guidance as to what constitutes "appropriate action" under the EEOA and finding that plaintiffs failed to show that Proposition 227, which replaced bilingual education with Structured English Immersion, violated the EEOA); *Teresa P. v. Berkeley Unified Sch. Dist.*, 724 F. Supp. 698, 713, 716 (N.D. Cal. 1989) (finding that under the Equal Educational Opportunities Act, district ELL programs only need to satisfy the scrutiny of "some experts," and that plaintiffs failed to meet their burden of showing that either the implementation or results of the district's ELL program were ineffective).

8. Perhaps most importantly, many ELL cases of the past four decades have arisen from desegregation cases, and school desegregation represents a foray on the part of the courts into uncomfortable territory. See, e.g., *United States v. Texas*, 601 F.3d 354, 372-73 (5th Cir. 2010).

### *Burden Shifting and Faulty Assumptions*

tion agencies and instead maintain a high level of deference to these bodies' policy determinations.<sup>9</sup> This has left ELLs in a difficult position when bringing a claim for denial of their right to an equal educational opportunity. More frequently than not, courts have found that school districts' programs meet constitutional and statutory mandates for minimum educational opportunity.<sup>10</sup>

Though courts have allowed for a great deal of discretion on the part of schools and districts, case law historically placed the burden on districts and states to demonstrate the effectiveness of their programs for ELL students.<sup>11</sup> Recent court decisions, however, have permitted the state to deflect responsibility for the widespread school failure at the high school level by blaming disparity in achievement on factors ostensibly external to the school itself—societal, economic, and cultural factors. This acceptance of external causation for ELL student failure—particularly at the high school level—is based on faulty assumptions and misconceptions about ELL populations. This Note argues that these misconceptions about secondary ELL populations served as a basis for the opinion in *Horne v. Flores*<sup>12</sup> and, as adopted by *U.S. v. Texas*,<sup>13</sup> create a dangerous precedent and severely undermine the protections for ELLs established by *Lau v. Nichols*<sup>14</sup> and the Equal Educational Opportunities Act of 1974 (“EEOA”).<sup>15</sup> Through these decisions, the courts have shifted the burden for broad student and school failure to the shoulders of the students themselves. Such burden shifting undermines the spirit and letter of statutory and case law governing ELL education policy.

Part I of this Note provides a brief description of the current status of ELLs in the United States as well as an overview of the law that controls questions of ELL educational rights. Part II discusses in greater depth *Lau v. Nichols* and its progeny; cases that place the burden of showing effectiveness of ELL programs on states and districts. Part III-A presents the divergence from previous case law evident in the recent decisions of *Horne v. Flores* and *U.S. v. Texas*. Part III-B

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9. See, e.g., *infra* discussion Section II.B.

10. See *supra* note 7 and accompanying text.

11. See, e.g., *Lau v. Nichols*, 414 U.S. 563, 571 (1974) (Stewart, J., concurring).

12. *Horne v. Flores*, 129 S. Ct. 2579, 2596 (2009).

13. *United States v. Texas*, 601 F.3d 354 (5th Cir. 2010).

14. *Lau*, 414 U.S. at 563 (holding that the San Francisco Unified School District violated Title VI by failing to address the English language deficiencies of some 1,800 students of Chinese ancestry).

15. 20 U.S.C. § 1703(f) (2006).

proceeds by illustrating the faulty assumptions (particularly as they pertain to high school ELLs) upon which these decisions are based. Ultimately, the EEOA should be revisited and redrafted, as it has become clear that in its current incarnation, the EEOA has proved less and less effective for protecting the right of ELL students to an equal, equitable, or meaningful educational opportunity. In the interim, however, Part IV takes a multi-faceted approach to recommendations for ensuring more effective secondary ELL programs.

Central to much of the current education debate are questions about how to address the educational needs of the growing number of students classified as English Language Learners.<sup>16</sup> There is a clear movement to align standards for achievement, and the current push toward education reform that encourages such common standards throughout the country has lately come to include English learners in its tide.<sup>17</sup> The courts' inability to accurately assess program effectiveness is due in great part to the EEOA's lack of real criterion by which such programs can be judged. However, without a new framework from which to assess ELL programs, these reforms will likely follow the path to obscurity of so many programs that have come before.

## I. WHERE WE ARE AND HOW WE GOT HERE

### A. Some Current Data on ELLs

English Language Learners represent the fastest growing school age population in the United States.<sup>18</sup> Though historically this popu-

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16. See, e.g., Jennifer Medina, *Another Rise in City Pupils Graduating in Four Years*, N.Y. TIMES, Mar. 10, 2010, at A25 (stating that though New York City's students showed improvements in graduation rates, less than 40% of the district's ELLs graduated on time in June 2009); Sharon Otterman, *State Puts Pressure on City Schools over English Language Learners*, N.Y. TIMES, Oct. 13, 2011, at A26 (stating that New York City's schools are failing to meet the needs of the ELL students).

17. For example, in January of 2011, The Department of Education posted a notice in the Federal Register seeking comment on a proposed grant program to encourage states to create English language proficiency tests for the Common Core State Standards Initiative. Enhanced Assessment Instruments Notice, 76 Fed. Reg. 1,138 (Dep't of Educ., Jan. 7, 2011). While advocates of English learner rights have praised this plan, there has also been some criticism of what appears to be a pattern of looking upon ELLs and their education as somehow separate from the greater school improvement movement. Professor Kenji Hakuta wrote in a message to the education publication *Education Week*, "I guess we are once again in a situation where the train has left the station, and here we are again (now with 5-plus million [ELL] students [in the United States]) watching it leave and trying to jump on." Mary Ann Zehr, Ed. *Department Backs English-Proficiency Tests for Common Standards*, EDUC. WK., Jan. 10, 2011, available at <http://www.edweek.org/ew/articles/2011/01/10/17ELLassess.h30.html?qs=Ed.+Department+Backs+English-Proficiency+Tests+for+Common+Standards>.

18. See Kathleen Flynn & Jane Hill, *English Language Learners: A Growing Population*, MCREL POLICY BRIEF (Mid-Continent Res. For Educ. & Learning, Denver, Colo.), Dec. 2005,



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lation has been concentrated in six states, which continue to have the highest population of ELLs, recent statistics show the population is shifting.<sup>19</sup> Between 2000 and 2005, the size of the nation's ELL population doubled in six states with historically low populations of ELLs.<sup>20</sup> Between 2000 and 2006, the highest ELL population percentage growth was seen in rural school districts and in the South and Midwest of the United States.<sup>21</sup> The vast majority of ELLs—as many as 75%—are Hispanic/Latino, with Spanish as their home language.<sup>22</sup>

The schools that ELLs attend are more socio-economically and racially/ethnically segregated than those attended by their non-ELL peers.<sup>23</sup> A recent comprehensive study conducted by the Editorial Projects in the Education Research Center reports that districts serving ELLs are made up of more than 75% minority students, as opposed to the districts of non-ELLs where the minority student population is just over 35%.<sup>24</sup>

As a group, ELLs perform at lower levels than their English-speaking counterparts on “virtually every measure, from achievement scores to graduation rates.”<sup>25</sup> Nowhere is the lack of equal educational opportunity more apparent than in reviewing data from secondary ELLs. As of 2010, twenty-three states require students to pass a high school exit exam to graduate from high school,<sup>26</sup> but ELL pass

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at 1, available at [http://www.mcrel.org/PDF/PolicyBriefs/5052PI\\_PBEnglishLanguageLearners.pdf](http://www.mcrel.org/PDF/PolicyBriefs/5052PI_PBEnglishLanguageLearners.pdf) (stating that between 1979 and 2003, the overall number of school-aged children increased by nineteen percent, whereas ELL student number increased by 124 percent, and that by the year 2030, projections are that ELLs “will comprise over forty percent of elementary and secondary students”).

19. Christopher B. Swanson, *Perspectives on a Population: English-Language Learners in American Schools*, EDUC. WK., Jan. 2009, at 3-4.

20. *Id.* at 3.

21. *Id.* at 9.

22. *Id.* at 10, 12.

23. *Id.* at 7; see also RICHARD FRY, PEW RES. CTR., EXPLAINING THE ENGLISH LANGUAGE LEARNER ACHIEVEMENT GAP (2008), available at <http://pewresearch.org/pubs/882/english-language-learner> (“[ELLs] tend to go to schools that have low standardized test scores. However, these low levels of assessed proficiency are not solely attributable to poor achievement by ELL students.”). Fry goes on to state that such schools also report poor student achievement in other subgroups, “and have a set of characteristics associated generally with poor standardized test performance—such as high student-teacher ratios, high student enrollments and high level of students living in or near poverty.” *Id.*

24. *Id.*

25. Patricia Gándara & Megan Hopkins, *The Changing Linguistic Landscape of the United States*, in FORBIDDEN LANGUAGE: ENGLISH LEARNERS AND RESTRICTIVE LANGUAGE POLICIES 7 (Patricia Gándara & Megan Hopkins eds., 2010). For example, in California, the National Assessment of Educational Progress reported that in both fourth and eighth grade math and reading for the year 2004, roughly 30% fewer ELLs achieved proficiency than their non-ELL counterparts. *Id.* at 11.

26. *Id.* at 11.

rates on these exams are 30% to 50% lower than those of their non-ELL counterparts.<sup>27</sup> In California, the state with the highest number of ELLs, only 49% of ELLs passed the exit exam on their first try—35% fewer than non-ELL students.<sup>28</sup>

Though much emphasis is focused on the *gap* in achievement between ELL and non-ELL students, even when measuring ELL progress toward English proficiency, the numbers are disheartening. In Texas, for instance, during the 2007-2008 school year, fewer than 20% of ELLs were found to be “making progress” toward proficiency in English.<sup>29</sup> In California, for the same year, the number was less than 48%, and in Arizona, the percentage of students “making progress” was just over 23%.<sup>30</sup> Nationwide, fewer than 35% of ELLs were found to be progressing toward proficiency.<sup>31</sup> These numbers are based on state-designed ELL assessments mandated by Title III of No Child Left Behind,<sup>32</sup> and generally represent only one component in determining whether an ELL is ready to be reclassified (or redesignated) as “fluent English proficient.”<sup>33</sup> And although such mandated assessments represent an improvement for recognition of ELL rights and needs, it is questionable that even progress according to these assessments equates to preparedness to compete academically with students’ non-ELL counterparts in mainstream classrooms.

As an illustration, recent data shows that 66% of tenth grade ELLs tested proficient in English according to California’s 2006 English Language Development Test, but only 4% of those students were able to score at grade level on the state’s English Language Arts

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27. NAT’L HIGH SCH. CTR., EDUCATING ENGLISH LANGUAGE LEARNERS AT THE HIGH SCHOOL LEVEL: A COHERENT APPROACH TO DISTRICT- AND SCHOOL-LEVEL SUPPORT 1 (2009), available at [www.betterhighschools.org/docs/EducatingELLsattheHSLevel\\_042209.pdf](http://www.betterhighschools.org/docs/EducatingELLsattheHSLevel_042209.pdf).

28. Gándara & Hopkins, *supra* note 25, at 11.

29. Swanson, *supra* note 19, at 30.

30. *Id.*

31. *Id.*

32. 20 U.S.C. § 6301 (1965) (*amended by* 20 U.S.C. § 6301 (2001)). English learner rights are addressed in both Title I and Title III of No Child Left Behind. Title I sets out accountability guidelines for identification, assessment, and parental involvement of English learners. *Id.* Title III addresses instructional programs requirements for educational agencies. *Id.*

33. States develop their own criteria for redesignation (or reclassification). California, for example, has fairly comprehensive reclassification requirements. *See* Cal. Dep’t of Educ., *Reclassification*, <http://www.cde.ca.gov/sp/el/rd/> (last visited Dec. 23, 2011). In order for a student to be considered Fluent English Proficient, she must meet several criteria. *Id.* First, she must achieve a composite score of Early Advanced or Advanced on the California English Language Development Test (“CELDT”) with no scores below three on any of the exam’s four subtests. *Id.* In addition, for schools to reclassify students, students need to achieve a score of mid-basic or better on the California Standard Test. *Id.* Lastly, students need to be achieving passing grades of “C” or better in their content-area classes. *See id.*

test.<sup>34</sup> It should be no wonder then, that these same students are unable to pass the required high school exit exam. Hispanic students, who make up the vast majority of the nation's ELL student population, are, according to some statistics, four times as likely as white students, and nearly twice as likely as African-American students to drop out of school.<sup>35</sup> To be certain, not all ELLs are Hispanic, and not all Hispanics are ELLs. But the correlation cannot be overlooked. There is little debate that ELL student achievement is an area of weakness for the nation's schools. Though states and districts have an affirmative duty to address these weaknesses, the question remains as to how to remedy the current situation. Particularly when considering that there has been an effort for more than four decades to address this issue.

#### B. The Development of ELL Rights

In 1970, the Office for Civil Rights ("OCR") of the U.S. Department of Health, Education and Welfare ("HEW")<sup>36</sup> released a memorandum extending the class of persons protected under Title VI of the Civil Rights Act of 1964<sup>37</sup> ("Title VI"). The memorandum stated that Limited English Proficient ("LEP") students were to be protected under the Act, and that a school district must take "affirmative steps to rectify the language deficiency" of LEPs in order to "open its instructional program" to these students.<sup>38</sup>

Title VI falls within the purview of the U.S. Department of Education ("DOE"), which is charged with its enforcement.<sup>39</sup> Although

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34. PATRICIA GÁNDARA & FRANCES CONTRERAS, *THE LATINO EDUCATION CRISIS* 125 (2010). The CELDT is a specially designed test for determining whether students should classify as ELL, how classified students are progressing, and when they have become "proficient" enough to be reclassified as Fluent English Proficient ("RFEP"). See *Cal. English Language Dev. Test*, CAL. DEP'T OF EDUC., <http://www.cde.ca.gov/ta/tg/el/> (last visited Jan. 12, 2011).

35. See U.S. DEP'T EDUC., NAT'L CENTER EDUC. STATISTICS (2011), <http://nces.ed.gov/fastfacts/display.asp?id=16> (showing that for 2009 the dropout rate for white students was 5.2%, for African-American students it was 9.3%, and for Hispanic students the dropout rate was 17.6%); see also GÁNDARA & CONTRERAS, *supra* note 34, at 1-2. Dropout statistics are notoriously difficult to calculate because they require following students from entry into public schools until graduation. Some students may drop out before middle or high school, others may move to a new district, state, or country and therefore not be accurately measured. For more information on dropout rates, see *id.*

36. This department is now called the United States Department of Education.

37. 42 U.S.C. § 2000(d) (2006).

38. Identification of Discrimination and Denial of Services on the Basis of National Origin, 35 Fed. Reg. 11,595 (July 18, 1970).

39. See *Race and National Origin Discrimination: Overview of the Law*, U.S. DEP'T EDUC., [www2.ed.gov/policy/rights/guid/ocr/raceoverview.html](http://www2.ed.gov/policy/rights/guid/ocr/raceoverview.html) (last modified Nov. 17, 2003).

Title VI provides parents and students an opportunity to file a complaint with the DOE who will then investigate claims of discriminatory treatment of language minority students, in order to sustain a cause of action, a showing of discriminatory intent is required—a heightened burden for plaintiffs to meet.<sup>40</sup> This would require that plaintiffs establish that the district or state intentionally sought to exclude ELLs from their educational programs. As Eden Davis points out, and case law supports, showing proof of discriminatory intent is a very difficult standard for plaintiffs to meet.<sup>41</sup> And after *Alexander v. Sandoval*, Title VI no longer provides for a private right of action under section 601.<sup>42</sup> Nonetheless, OCR can and does institute investigations, orders, and compliance reviews for monitoring discriminatory impact claims.<sup>43</sup> However, these provide little immediate remedy to students who are affected by failing educational programs. Currently, the best chance an ELL parent or student has for seeking redress for an inadequate education is through the EEOA.<sup>44</sup>

The EEOA states simply “no state shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . (f) the failure by an educational agency to take *appropriate action* to overcome language barriers that impede *equal participation* by its students in its instructional programs.”<sup>45</sup> This statutory framework provides a private right of action for ELLs, offering some opportunity to be heard regarding their complaints. But as any civil rights advocate well knows, a requirement that a state actor take “appropriate action” leaves ample room for interpretation, and there is no legislative history to help determine how “appropriate action” should be defined.<sup>46</sup> Because the Act was passed on the heels of the Supreme Court’s decision in *Lau v. Nichols*, it is believed by many scholars that the Act essentially codified the Court’s decision.<sup>47</sup>

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40. See generally *Guardians Ass’n v. Civil Serv. Comm’n of New York*, 463 U.S. 582 (1983) (affirming Second Circuit holding that relief could not be granted under Title VI because plaintiffs did not establish discriminatory intent on part of defendant).

41. Eden Davis, *Chalk Talk: Unhappy Parents of Limited English Proficiency Students: What Can They Really Do?*, 35 J.L. & EDUC. 277, 281 (2006).

42. See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

43. See ABOUT OCR, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (last modified Mar. 23, 2005).

44. See 20 U.S.C. § 1703(f) (2006).

45. *Id.* (emphasis added).

46. See *id.*; see also *Castañeda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

47. *Castañeda*, 648 F.2d at 1008:

[A]lthough serious doubts exist about the continuing vitality of *Lau v. Nichols* as a judicial interpretation of the requirements of Title VI or the fourteenth amendment, the essential holding of *Lau*, i.e., that schools are not free to ignore the need of limited

## II. LAU AND CASTAÑEDA: ACCOUNTABILITY FOR DISTRICTS AND STATES

### A. *Lau v. Nichols*

*Lau*, the foundational case in ELL law, was a class action brought in the Northern District of California by some 1,800 students of Chinese ancestry and their parents against San Francisco Unified School District.<sup>48</sup> The students claimed that the district violated the Equal Protection Clause and Title VI by failing to establish a program to rectify the students' English deficiencies, resulting in unequal educational opportunities.<sup>49</sup> Both the district court and the court of appeals found for the district.<sup>50</sup> The Supreme Court granted certiorari "because of the public importance of the question presented."<sup>51</sup>

The Court rejected the court of appeals' reasoning "that every student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic, and cultural background, created and continued completely apart from any contribution by the school system,"<sup>52</sup> finding rather that because English was the designated language of instruction,<sup>53</sup> and because it was the state's responsibility to "insure 'mastery of English by all pupils in all schools,'" that the state's failure to provide appropriate instruction to language minority students violated these students' rights.<sup>54</sup> Further, because education between the ages of six and six-

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English speaking children for language assistance to enable them to participate in the instructional program of the district, has now been legislated by Congress, acting pursuant to its power to enforce the fourteenth amendment, in § 1703(f).

See also Rachel F. Moran, *Undone by Law: The Uncertain Legacy of Lau v. Nichols*, 16 BERKELEY LA RAZA L.J. 1, 6 (2005).

48. *Lau v. Nichols*, 414 U.S. 563, 565 (1974).

49. *Id.* at 564-65. The Court did not reach the equal protection claim, relying on the Title VI allegations for their determinations. *Id.* at 566. After *Alexander v. Sandoval*, 532 U.S. 275 (2001), there is no longer a private right of action under Title VI. However, the Court has never expressly overruled *Lau*, finding only that the *Lau* Court misinterpreted § 601 of Title VI but leaving the central holding of *Lau* undisturbed. *Sandoval*, 532 U.S. at 285. In a concurring opinion to *Lau*, Justice Stewart, joined by Chief Justice Rehnquist and Justice Blackmun argued that the guidelines set forth by HEW met the standards by which remedial legislation is measured, meaning that essentially, their guidelines for school districts receiving federal funds were within the Department's authority to promulgate due to their being "consistent with achievement of the objectives" of the statute. *Lau*, 414 U.S. at 571 (Stewart, J., concurring); see also 42 U.S.C. § 2000d-1 (1964).

50. *Lau*, 414 U.S. at 565.

51. *Id.*

52. *Id.* (quoting *Lau v. Nichols*, 483 F.2d 791, 797 (9th Cir. 1973)).

53. *Id.* (quoting CAL. EDUC. CODE § 71) (1973)).

54. *Id.* at 565-66 (quoting CAL. EDUC. CODE § 71).

teen is mandatory and compulsory<sup>55</sup> and because students would only receive high school diplomas after having met English proficiency, it would be discriminatory and prohibited under § 602 of Title VI to deny them appropriate instruction for their specific needs.<sup>56</sup> The Court acknowledged the state's authority to choose the education policy it saw fit to employ, yet placed on the state the responsibility of rectifying language deficiencies:

[T]here is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.<sup>57</sup>

Further, the Court relied upon the 1970 HEW guidelines,<sup>58</sup> stating that Chinese-speaking students' receipt of fewer educational benefits "denie[d] them a meaningful opportunity to participate in the educational program—which are all earmarks of the discrimination banned by the [HEW] regulations."<sup>59</sup> The Court quoted Senator Humphrey's speech given during floor debates for the 1964 Civil Rights Act: "Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."<sup>60</sup> Thus, the Court stated, in an oft-quoted and much focused upon passage, that the district had the responsibility to provide appropriate accommodations to the non-English proficient students: "[t]eaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instructions to this group in Chinese is another. There may be others."<sup>61</sup>

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55. *Id.* at 566 (citing CAL. EDUC. CODE § 12101); *see also* Plyler v. Doe, 457 U.S. 202, 222-23 (1982).

56. *Id.* (citing CAL. EDUC. CODE § 8573).

57. *Id.*

58. *See supra* note 38 and accompanying text.

59. *Lau*, 414 U.S. at 568 (emphasis added).

60. *Id.* at 569 (quoting 110 CONG. REC. 6543 (1964)).

61. *Id.* at 565. This passage has been a source of much discussion regarding program choice for ELLs. Proponents of English-only policies have used it as a means of dismissing advocates of

### *Burden Shifting and Faulty Assumptions*

Following the *Lau* decision, Congress, “reflecting [the] concerns” presented by the *Lau* Court,<sup>62</sup> enacted § 1703(f) of the Equal Education Opportunities Act of 1974 (“EEOA”).<sup>63</sup> The relevant section, 1703(f), states:

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by . . . (f) the failure by an educational agency to take *appropriate action* to overcome language barriers that impede *equal participation* by its students in its instructional programs.<sup>64</sup>

Since its passage more than thirty-five years ago, there has been little guidance on the part of the federal government as to how to interpret this language. In struggling schools, “equal participation” could easily be interpreted as allowing all students to fail equally.<sup>65</sup> Indeed, ELL students are in good company in their lack of meaningful educational opportunity.<sup>66</sup> But the fact remains that there is little clarity as to how to assess and remedy claims of a denial by an educational agency of an equal educational opportunity for ELLs. The clearest interpretation for how to define the intent of § 1703(f) came from the Fifth Circuit, in the pivotal ELL case, *Castañeda v. Pickard*.<sup>67</sup>

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bilingual education. Additionally, bilingual education advocates have used it to bolster a belief that perhaps the *Lau* Court was offering bilingual education as a preferred method of instruction. But keeping the debate at the program choice level leaves ELLs with little actual remedy because “appropriate action” under § 1703(f) has been so broadly interpreted that it provides a remarkably high level of deference to educational agencies to choose any given program provided they have some basis for their choice. See *Castañeda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

62. See *Horne v. Flores*, 129 S. Ct. 2579, 2610 (2009) (Breyer, J., dissenting).

63. 20 U.S.C. § 1703 (2006). The EEOA prohibits discrimination on the part of any agencies receiving federal funds.

64. *Id.* at § 1703(f) (emphasis added).

65. See RICHARD FRY, PEW HISPANIC CTR., THE ROLE OF SCHOOLS IN THE ENGLISH LANGUAGE LEARNER ACHIEVEMENT GAP, at i (2008), available at <http://www.pewhispanic.org/files/reports/89.pdf> (“[ELLs] tend to go to public schools that have low standardized test scores. However, these low levels of assessed proficiency are not solely attributable to poor achievement by ELL students.”). Fry goes on to state that such schools also report poor student achievement in other subgroups, “and have a set of characteristics associated generally with poor standardized test performance—such as high student-teacher ratios, high student enrollments and high level of students living in or near poverty.” *Id.*

66. Students who qualify for special education services under IDEA, as well as students classified as having low socioeconomic status, also historically underperform their more affluent, non-disabled, and English-speaking counterparts. See, e.g., Nirvi Shah, *Federal Data Shed Light on Education Disparities*, EDUC. WK. (July 1, 2011), <http://www.edweek.org/ew/articles/2011/07/01/36data.h30.html?qs=Federal+Data+Shed+Light+on+Education+Disparities>.

67. *Castañeda v. Pickard*, 648 F.2d 989 (5th Cir. 1981).

B. *Castañeda v. Pickard*: Defining “Appropriate Action” under §1703(f)

In *Castañeda*, a group of Mexican-American students brought suit against a Texas school district claiming that the district implemented policies and practices that discriminated against the students based on their race/ethnicity.<sup>68</sup> Specifically, plaintiffs claimed that the district discriminated against them by implementing a grouping system that based student placement on ethnicity and language rather than on achievement or ability, and by the district’s failure to provide adequate bilingual instruction.<sup>69</sup> *Castañeda* remains significant today based on its interpretation of the EEOA as requiring a three-pronged analysis that is still in use by courts.

The Fifth Circuit noted in *Castañeda* that “[c]ongress has provided us with almost no guidance, in the form of text or legislative history, to assist us in determining whether a school district’s language remediation efforts are ‘appropriate.’”<sup>70</sup> In an attempt to provide some assistance, *Castañeda* required that (1) a chosen program be based upon “sound” educational theory; (2) the educational agency take steps to effectively implement the program as adopted; and (3) after a “legitimate trial period,” the program be evaluated to determine its effectiveness in overcoming language barriers for ELL students.<sup>71</sup>

The test provides great latitude in the first prong, allowing for use of any educational theory that is “recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy.”<sup>72</sup> It seems apparent that the court was reluctant to curb agency authority. But a focus on program choice where the only requirement for the validity of any program is that “some” experts find the program to be sound leaves to educational agencies a significant level of unchallenged discretion. As a result, this has led to a series of revolving programs in schools and inconsistency for ELLs and their teachers.<sup>73</sup> This becomes quite evident when looking at data for long-term

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68. *Id.* at 992.

69. *Id.*

70. *Id.* at 1009.

71. *Id.* at 1009-10.

72. *Id.* at 1009 (emphasis added).

73. See Margarita Espino Calderón, *Expediting Language, Literacy and Learning for Adolescent ELLs*, IN THE STAR LIGHT (Dec. 2008), available at <http://en.elresearch.org/issues/6>.



### *Burden Shifting and Faulty Assumptions*

English Language Learners (“LTELL”),<sup>74</sup> who represent a significant portion of ELLs.<sup>75</sup> Not only do the achievement data for LTELLs illustrate the pitfalls of inconsistency in educational programs, the very existence of LTELLs in their current number serves as a cautionary tale.

As Eric Haas points out, language acquisition and learning theories, like scientific understanding, operate as part of a “communal undertaking.”<sup>76</sup> To be qualified as an expert in a scientific field, a person needs to meet several criteria establishing their reliability.<sup>77</sup> In contrast, when considering proffered expert testimony in EEOA claims, the courts have accepted “expert” testimony from people with no certification in teaching practices, learning theory, or indeed language acquisition.<sup>78</sup> As Haas states, in doing so, the courts “have created a legal test without substance that permits education policy to adhere to disfavored, extreme views of scientific understandings in forming their policies and programs for English language support in school which violates the plain language of § 1703(f) of the EEOA and Congress’ intent in enacting it” and have thereby “gutted” the Act’s requirements.<sup>79</sup> The current nationwide movement in favor of English immersion instead of bilingual instruction despite vast consensus among well-respected linguists and learning theorists concerning the benefits of bilingual instruction demonstrates this problem.<sup>80</sup> And this allowance for relatively unsupported “expertise” creates a situation in

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74. Long-term English language learners are defined as ELLs who have been in U.S. schools for six or more years and have not been reclassified as English proficient. *See, e.g.*, Jimmy Kilpatrick, *Report Finds Long-Term ELLs Languishing in Calif. Schools*, EDUC. NEWS (May 28, 2010), [http://www.educationnews.org/ednews\\_today/91929.html](http://www.educationnews.org/ednews_today/91929.html).

75. *See Long-Term English Language Learner Project*, RES. INST. FOR THE STUDY LANGUAGE IN URBAN SOC’Y, <http://web.gc.cuny.edu/Linguistics/rislus/projects/LTELL/> (last updated Nov. 23, 2008); *see also, e.g.*, Kate Menken & Tatyana Kleyn, *The Difficult Road for Long-Term English Learners*, EDUC. LEADERSHIP (2009), [http://www.ascd.org/publications/educational\\_leadership/apr09/vol66/num07/The\\_Difficult\\_Road\\_for\\_Long-Term\\_English\\_Learners.aspx](http://www.ascd.org/publications/educational_leadership/apr09/vol66/num07/The_Difficult_Road_for_Long-Term_English_Learners.aspx) (“Recent data show that approximately one-third of all English language learners in grades 6-12 in New York City are actually long-term English language learners . . .”).

76. Eric Haas, *The Equal Educational Opportunity Act 30 Years Later: Time to Revisit “Appropriate Action” for Assisting English Language Learners*, 34 J.L. & EDUC. 361, 362 (2005).

77. *See id.* at 382-83.

78. *See, e.g., id.* at 369 (discussing ELL decisions wherein few facts to demonstrate how those who were deemed experts were found to qualify as such). *See generally In re Flores v. Arizona*, No. 92CV00596, 2006 WL 5908544 (D. Ariz. Nov. 15, 2008) (partial expert testimony of Kim B. Baker) (stating that Ms. Baker holds no professional degrees or certificates, took no classes in education, and has knowledge of K-12 education only through her work with the Arizona legislature).

79. *See Haas, supra* note 76, at 363.

80. *See KENJI HAKUTA ET AL., HOW LONG DOES IT TAKE ENGLISH LEARNERS TO ATTAIN PROFICIENCY?* 13-14 (2000).

which misconceptions about language acquisition and ELL students are able to serve as foundation for policy determinations.

The second and third prongs of the *Castañeda* test require inquiry into whether the chosen program has been implemented effectively and whether the educational agency can show it has worked effectively.<sup>81</sup> In *Gomez v. Illinois State Board of Education*, the Seventh Circuit reversed the District Court's dismissal of a claim brought by a group of language minority students, finding meritorious the students' claim that the State Board of Education violated § 1703(f) by failing to create and implement uniform and consistent guidelines for identification, placement, and education of ELLs.<sup>82</sup> The court looked to *Castañeda* for guidance, but qualified its use of the *Castañeda* test, stating:

[W]e do not mean to say that we are adopting without qualification the jurisprudence developed in the Fifth Circuit regarding the interpretation of the EEOA. However, the *Castaneda* [sic] decision provides a fruitful starting point for our analysis. The fine tuning must await future cases. We, for example, may find that the *Castaneda* [sic] guidelines, when applied to a broad range of cases, provide for either too much or too little judicial review.<sup>83</sup>

Coming one year after the Fifth Circuit's decision in *Castañeda*, the *Gomez* decision seems to be calling for more direction from Congress as to how to interpret § 1703(f). Since that time, nearly thirty-five years ago, no such guidance has come. But *Castañeda*'s test sets a framework for challenging school programs for ELLs that placed upon districts the burden of demonstrating the validity and effectiveness of their programs. Recent challenges to state implementation (through its funding of the program) and subsequent results, have severely limited plaintiffs' available remedy by shifting that burden.<sup>84</sup>

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81. *Castañeda v. Pickard*, 648 F.2d 989, 1010 (5th Cir. 1981).

82. *Gomez v. Ill. State Bd. of Educ.*, 811 F.2d 1030, 1033, 1044 (7th Cir. 1987).

83. *Id.* at 1041.

84. *See Horne v. Flores*, 129 S. Ct. 2579, 2610 (2009); *see also United States v. Texas*, 601 F.3d 354 (5th Cir. 2010).

III. *HORNE V. FLORES AND U.S. V. TEXAS:*  
UNDERMINING *LAU* AND THE EEOA

A. Divergence from *Lau*'s Intent

Two lines of cases have developed since 1974 when the Supreme Court decided the seminal case *Lau v. Nichols*.<sup>85</sup> As seen in the discussion of *Lau* and *Castañeda*, the responsibility originally fell on the educational agency to establish that their program(s) for students whose primary language was not English were effective and appropriate to overcome barriers to these students' access to the curriculum.<sup>86</sup> Recently, however, the onus has been shifted to plaintiffs to prove a negative—that external factors are not the cause of ELL student achievement failings.<sup>87</sup>

1. *Horne v. Flores*, the District Court's Findings

In 1992, Miriam Flores, an English learner in the southern Arizona school district of Nogales, as representative of a class of ELL students and their parents, filed a claim against the state of Arizona.<sup>88</sup> The claim alleged that Arizona was denying ELL students an equal educational opportunity by the state's failure to provide an instructional program "calculated to make [ELLs] proficient in speaking, understanding, reading, and writing English, while enabling them to master the standard academic curriculum as required of all students."<sup>89</sup> After several years of pretrial motions, the case was tried before the United States District Court for the District of Arizona.<sup>90</sup>

More wrangling by the parties followed, and then in 2000, the district court found the state was violating the EEOA by not implementing a funding scheme that was "reasonably calculated to effectively implement the program" the state had chosen for its ELLs—which was a violation of *Castañeda*'s second prong.<sup>91</sup> In particular, the district court found that the funding scheme for ELL programs was arbitrary and capricious and not calculated to effectively imple-

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85. *Lau v. Nichols*, 414 U.S. 563, 571 (1974).

86. See discussion *supra* Part II.A-B.

87. See *Horne*, 129 S. Ct. at 2610; see also *Texas*, 601 F.3d at 354.

88. *Horne*, 129 S. Ct. at 2589.

89. *Flores v. Arizona*, 48 F. Supp. 2d 937, 939 (D. Ariz. 1999).

90. See *id.* at 943-45.

91. *Flores v. Arizona*, 516 F.3d 1140, 1144-45 (9th Cir. 2008), *rev'd sub nom.*, *Horne*, 129 S. Ct. 2579 (2009).

ment the state's ELL program.<sup>92</sup> The court ordered the state of Arizona to prepare a cost study to evaluate the proper funding required to implement their chosen program.<sup>93</sup> What followed were years of Arizona refusing to comply with the court's order, even in the face of the court holding the state in contempt and an accrued fine of more than twenty million dollars.<sup>94</sup>

Subsequently, in March 2006, Arizona's state legislature passed House Bill ("HB") 2064, which, among other things, increased ELL incremental funding and placed a two-year limit on the allocation of such funding.<sup>95</sup> The governor of Arizona refused to sign the bill, but nonetheless allowed it to become law.<sup>96</sup> Proponents of the bill saw it as a means of meeting the requirements of the district court order. Along with the State Board of Education and the state, the governor joined the plaintiffs in the action and was a respondent in the case.<sup>97</sup> The President of the Senate and the Speaker of the state House of Representatives (collectively "petitioners") then sought leave to intervene, as HB 2064 would otherwise not have been defended.<sup>98</sup>

## 2. *Horne v. Flores*, the Supreme Court's Ruling

At the Supreme Court, the case was essentially a procedural challenge. The Court, while acknowledging the "subpar performance" of Nogales's high school English Learners as "an area of weakness," stated that any comparison between English Learners and native English speakers required consideration of social and cultural factors that may affect results.<sup>99</sup> The Court went on to say that the district court had made "insufficient factual findings to support a conclusion that the high schools' problems stem from a failure to take 'appropriate action,' and constitute a violation of the EEOA."<sup>100</sup> In a footnote to these statements, the Court stated that the low performance of Nogales's high school students could have "many possible causes," including "the difficulty of teaching English to older students (many of whom, presumably, were not in English-speaking schools as younger

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92. *Flores v. Arizona*, 480 F.Supp. 2d 1157, 1167 (D. Ariz. 2009) *aff'd*, 516 F.3d 1140 (9th Cir. 2008), *rev'd sub nom.*, *Horne*, 129 S. Ct. 2579 (2009).

93. *Flores v. Arizona*, 160 F. Supp. 2d 1043, 1046-47 (D. Ariz. 2000).

94. *Horne v. Flores*, 129 S. Ct. 2579, 2590 (2009).

95. *Id.*

96. *Id.*

97. *Id.* at 2591.

98. *See id.*

99. *Id.* at 2605.

100. *Id.*

*Burden Shifting and Faulty Assumptions*

students) and problems, such as drug use and the prevalence of gangs.”<sup>101</sup> The Court supported these statements based on the Reply Brief submitted by the Superintendent of Nogales Unified School District (“NUSD”).<sup>102</sup>

In the Brief, petitioners cited the trial testimony of Kelt Cooper who served as superintendent of NUSD from 2001 to 2005.<sup>103</sup> Cooper testified that test scores generally fall at the higher grade levels and that the district would be implementing “radical reforms” at the elementary level that would create a “feeder effect” at the higher grades.<sup>104</sup> It appears the thinking is that by focusing on the lower grades and better preparing students for later grade levels, the district will create a better-educated high school student. This logic does not appear to be supported by the data.<sup>105</sup>

Additionally, Cooper’s testimony spoke to gangs, the “endemic” drug problem at the NUSD high schools, and their contribution to low test scores of students in these schools.<sup>106</sup> Though the brief does not appear to state that these problems (of gangs and drugs) are unique to ELLs (who, particularly in Arizona, are majority Hispanic), the Court seems to have adopted this as an explanation for the gap between ELL and non-ELL student scores. It appears the Court has made an inferential step stating that these problems are more persistent in the ELL population than in the non-ELL population. Yet, the Court does not appear to cite any support for this belief beyond the statements made by Cooper. Furthermore, if the problems of gangs and drugs

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101. *Id.* at 2605 n.20.

102. *Id.*

103. Brief for Petitioner at 16, *Horne v. Flores*, 129 S. Ct. 2579 (2009) (Nos. 08-289, 08-294), 2009 WL 977961.

104. *Id.* This argument has been made by many districts; elementary schools often become the focus of education reform with the thought that the “feeder effect” will, somewhere down the line, create positive change for the higher grades. See Carolyn L. Carlson, *Lowering the High School Dropout Rate in the United States: The Need for Secondary Reading Specialists and How Scarce They Really Are*, 1 INT’L J. HUMAN. & SOC. SCI. 13, 20 (Sept. 2011), available at [http://www.ijhssnet.com/journals/Vol\\_1\\_No\\_13\\_Special\\_Issue\\_September\\_2011/3.pdf](http://www.ijhssnet.com/journals/Vol_1_No_13_Special_Issue_September_2011/3.pdf) (“Adolescents are being short-changed. No one is giving adolescent literacy much press. It is certainly not a hot topic in educational policy or a priority in schools. In the United States, most Title I budgets are allocated for early intervention—little is left over for the struggling adolescent reader.”).

105. See, e.g., Nirvi Shah, *Early Achievers Losing Ground, Study Finds*, EDUC. WK. (Sept. 20, 2011), <http://www.edweek.org/ew/articles/2011/09/20/05gifted.h31.html?tkn=LSVFCbN%2F6O1rj6bK4bIKwESWdntxB50NB14gf&intc=es> (citing a study by the Thomas B. Fordham Institute finding that of nearly 82,000 students tested, of those who tested in the 90th percentile as third graders, only 57.3% did as well by the time they reached the eighth grade).

106. Brief for Petitioner, *supra* note 103, at 16.

are prevalent in NUSD schools, it would seem to follow that all students would be failing equally.

The Ninth Circuit had noted the “persistent achievement gaps documented” by the district court in Nogales’ state standardized test results between ELL and non-ELL students.<sup>107</sup> The Court concluded that the district court had made insufficient factual findings to warrant the conclusion that such persistence in achievement gap was due to a failure on the part of the district, stating, “any such comparison must take into account other variables that may explain the gap.”<sup>108</sup> These variables included, for the Court, the above-mentioned prevalence of gangs and drugs.

In addition to the fact that these factors appear unsupported by anything other than the “expert” testimony of NUSD’s former superintendent, they create a “catch-22” for plaintiffs. If the Court does not recognize that often an impetus for gang involvement stems from a sense of isolation and lack of educational opportunity, then it will be difficult to connect such outcomes to the schools that may, even inadvertently, foster it.<sup>109</sup> Consistently, those who study the sociology of youth gangs point to risk factors for entry into gangs such as poverty, alienation, and a sense that the dominant society does not support them.<sup>110</sup> At school, this overall sense of isolation is compounded by factors such as persistent academic failure, negative labeling by teachers, and general academic frustration.<sup>111</sup> For immigrant youth, this isolation is particularly acute due to language differences that create a further inability to find a place in the dominant, English-speaking society.<sup>112</sup> As a result, it is true that young people sometimes then see gangs as a vehicle by which to achieve status and acceptance outside of the mainstream culture.<sup>113</sup> But the expert presented by the defen-

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107. *Horne*, 129 S. Ct. at 2605.

108. *Id.*

109. Risk factors for youth gang involvement include isolation, disconnectedness from school and community, and a lack of success in school. See Karl Hill et al., *Childhood Risk Factors for Adolescent Gang Membership: Results from the Seattle Social Development Project*, 36 J. RES. CRIME & DELINQ. 300, 313-14 (2009), available at [http://www.hawaii.edu/hivandaids/Childhood\\_Risk\\_Factors\\_for\\_Adolescent\\_Gang\\_Membership\\_\(Seattle\).pdf](http://www.hawaii.edu/hivandaids/Childhood_Risk_Factors_for_Adolescent_Gang_Membership_(Seattle).pdf).

110. LEWIS YABLONSKY, GANGS IN COURT 102 (2008).

111. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, YOUTH GANGS: AN OVERVIEW, Aug. 1998, at tbl.1, available at <http://www.ojjdp.gov/jjbulletin/9808/chart.html>; see Caroline Glesmann et al., *Youth in Gangs: Who is at Risk?*, FOCUS: VIEWS FROM THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY 2 (July 2009), available at [http://www.nccd-crc.org/nccd/pdf/Youth\\_gangs\\_final.pdf](http://www.nccd-crc.org/nccd/pdf/Youth_gangs_final.pdf).

112. YABLONSKY, *supra* note 110, at 62.

113. *Id.* at 42.

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dant district appears not to have presented any data supporting his statement that the failure of students could be causally tied to these alleged problems. Again, most significantly, this shift of responsibility for student failure to the circumstances outside of the classroom goes against *Lau*.<sup>114</sup>

As stated above,<sup>115</sup> the *Lau* Court specifically dismissed the Ninth Circuit Court of Appeals's reasoning that social, economic, and cultural "disadvantages" brought with students into their classrooms somehow dismiss schools from the responsibility to provide them with equal access to the curriculum.<sup>116</sup> Nevertheless, the majority in *Horne* appears to have returned to the same reasoning as applied by the Ninth Circuit in *Lau*.

In a dissent to the *Horne* decision, Justice Breyer stated that the majority's conclusion "ignore[s] well-established law that accords deference to the District Court's fact-related judgments."<sup>117</sup> Furthermore, a requirement that other variables be considered shifts the burden to plaintiffs (the non-moving party) to "negate the possibility that these other causes" account for the poor performance of Nogales's high school students.<sup>118</sup> Placing such a requirement on plaintiffs instead of the defendant state and district representatives (who are the petitioners before the Court), removes from the state, as petitioners, their duty to demonstrate for the court their compliance with federal law.<sup>119</sup> Rather, the Court places upon plaintiffs the responsibility to disprove any possible external causes for students' lack of progress, a near impossibility. In making these statements, the Court places the onus for widespread failure of high school English learners directly on the shoulders of the students themselves and is contrary to the express language of *Lau*.

As Professor Derek Black points out, under the courts' interpretation of the EEOA, plaintiffs "must establish that a district's current program is causing diminished achievement or failing to elevate students' achievement to the appropriate level."<sup>120</sup> And such a showing

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114. See discussion *supra* Part III.A.

115. *Id.*

116. *Lau v. Nichols*, 414 U.S. 563, 565 (1974) (citing *Lau v. Nichols*, 483 F.2d 791, 797 (9th Cir. 1973)).

117. *Horne v. Flores*, 129 S. Ct. 2579, 2626 (2009) (Breyer, J., dissenting).

118. See *id.*

119. See *id.*

120. Derek Black, *The Fatal Flaws of Education Reform: Causal Gaps and Doctrinal Incoherence* 14 (published manuscript) (on file with author).

“as a practical matter, is nearly impossible.”<sup>121</sup> Because *Castañeda* requires only that a district adopt *some* program accepted by *some* expert(s),<sup>122</sup> a plaintiff’s challenge to program choice is likely to fail unless it can be shown that the program is not effective. And, as seen in *Horne*, proving that a program is ineffective now requires elimination of all other possible factors that may contribute to student underperformance.<sup>123</sup> This precedent becomes even more troublesome when considering a subsequent decision out of Texas.

### 3. *U.S. v. Texas*: Extending *Horne*’s Reasoning

*U.S. v. Texas* began in 1970 as a desegregation suit under Title VI of the Civil Rights Act of 1964.<sup>124</sup> In 1972, Latin American civil rights groups intervened.<sup>125</sup> Plaintiff ELL students invoked § 1703(f) of the EEOA and called for the Texas Education Agency (“TEA”) to implement a plan that would provide all ELLs with bilingual education and other programs to overcome the effects of past discrimination.<sup>126</sup> The court issued a remedial decree requiring TEA to take affirmative steps to remedy EEOA and equal protection violations and to retain jurisdiction over the order.<sup>127</sup>

After more than thirty years of squabbling (often with plaintiffs unable to successfully argue that TEA had failed to meet its end of the bargain), the district court’s 2008 decision presented a hopeful outcome for plaintiffs. In 2008, the court granted plaintiffs’ motion to amend its 2007 judgment and found that TEA’s newly adopted monitoring system did not fulfill the agency’s requirement to effectively implement an ELL program that included appropriate monitoring of student progress.<sup>128</sup> Judge Justice,<sup>129</sup> the authoring judge, found that TEA’s ELL programs effectively excluded ELLs from advanced

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121. *Id.*

122. *Id.*

123. *Castañeda v. Pickard*, 648 F.2d 989, 1009 (5th Cir. 1981).

124. *United States v. Texas*, 601 F.3d 354, 357.

125. *See id.*

126. *United States v. Texas*, 572 F. Supp. 2d 726, 732-33 (E.D. Tex. 2008) (2010), *rev’d*, 601 F.3d 354 (5th Cir. 2010).

127. *See United States v. Texas*, 506 F. Supp. 405, 439-42 (E.D. Tex. 1981) *rev’d*, 680 F.3d 356 (5th Cir. 1982) (requiring the district to fulfill several elements in order to achieve complete and effective relief from the constitutional and statutory violations found).

128. *Texas*, 572 F. Supp. 2d at 782 (“The Performance Based Monitoring Analysis System [“PBMAS”] system does not fulfill TEA’s requirement to effectively implement the LEP program.”).

129. For more information about Judge William Wayne Justice and his impact on education and civil rights, see *William Wayne Justice, Judge Who Remade Texas, Dies at 89*, N.Y. TIMES, Oct. 16, 2009, at B11.



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placement programs, and that the monitoring system failed to significantly disaggregate data, in essence masking the negative results particularly at the secondary level.<sup>130</sup>

Judge Justice's decision was a promising one for plaintiffs in large part because he so fully engaged the data. *Castañeda's* third prong requires monitoring of ELL programs for indications that the program is actually working.<sup>131</sup> Without a careful and thorough analysis of the data, it is impossible to know whether such programs are indeed functioning as intended and required. Judge Justice, in amending his previous decision, fully engaged the data, analyzing longitudinal data for both elementary and secondary students, looking at data for LTELLs, considering the possible under-reporting of students eligible for ELL services and the lack of information given to parents regarding program options.<sup>132</sup> In 2010, however, the Fifth Circuit reversed Judge Justice's decision.<sup>133</sup>

In *U.S. v. Texas*, the Fifth Circuit distinguished the disparities for secondary students from those of primary students, stating: "While we agree that primary and secondary LEP students in a given school district likely exist in similar social and economic situations, we do not believe they are exposed to the same challenges."<sup>134</sup> The court goes on to characterize the Supreme Court's statements as specific to secondary ELL students, who ostensibly "face a greater number of obstacles" than primary students.<sup>135</sup> The court cites no studies or data supporting these conclusions, but notes, "that a significant difference between primary and secondary students is their ability to obtain gainful employment. Secondary students who are able to alter their economic position through employment will invariably have less time to devote to their studies and may feel added pressure to drop out of school altogether."<sup>136</sup> Such findings may well be true for some percentage of the students in a given district, but the court referred to no data, no studies, and no expert testimony supporting this conclusion. After quoting in its entirety the *Horne* Court's footnote regarding the

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130. *Texas*, 572 F. Supp. 2d at 737, 755.

131. *Castañeda v. Pickard*, 648 F.2d 989, 1010 (1981).

132. *See Texas*, 572 F. Supp. 2d. at 737-53 (assessing the effectiveness of the PBMAS monitoring).

133. *United States v. Texas*, 601 F.3d 354, 374-75 (5th Cir. 2010).

134. *Id.* at 372.

135. *Id.*

136. *Id.* at 372 n.25 (quoting *Horne v. Flores*, 129 S. Ct. 2579, 2605 n.20 (2009)).

“many possible causes for the [under-] performance”<sup>137</sup> of ELL students, the court held that the district court abused its discretion by “failing to address other possible causes of student failure.”<sup>138</sup> This decision, following the *Horne* Court’s reasoning, requires plaintiffs to eliminate all other possible causes for students’ lack of achievement; therefore, potentially “even a state’s refusal to significantly support ELL programs will go unchecked unless a plaintiff can control for numerous variables and causally connect state policy to student outcomes.”<sup>139</sup>

Regarding prong two—the implementation prong—of *Castañeda*, the court stated that if ELL students were not faring well on examinations, that was to be expected because the exams were in English.<sup>140</sup> This statement fails to take into account the lack of progress even on those exams designed to measure ELL progress toward English proficiency. Not only were students in Texas found by the district court to be denied equal opportunity by their failure to achieve in language arts and mathematics, they were also not achieving at the state’s required rates of language acquisition.<sup>141</sup>

Furthermore, while it may be true that the EEOA does not require absolute parity between ELL and non-ELL student achievement, it does require equality of educational opportunity, and a finding that ELL students are not being included in advanced placement courses should not be so easily dismissed. The court also stated “the rate of [ELL] secondary student participation in advanced courses is of little probative value—it is to be expected that those students still attempting to achieve English proficiency are not as likely to take part in advanced courses.”<sup>142</sup> But course selections should be accessible to students based on intellectual capacity and not solely on English proficiency.<sup>143</sup> The *Castañeda* court made it clear that ability

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137. *Id.*

138. *Id.*

139. Black, *supra* note 120, at 17.

140. See *United States v. Texas*, 601 F.3d 354, 367-68 (2008), stating that: standardized tests are administered to secondary LEP students in English, a language in which they, by definition, lack proficiency . . . . English administration makes it difficult for test results to accurately capture an LEP student’s knowledge of core curriculum, and it is inevitable that such students will not perform as well as non-LEP students.

141. *United States v. Texas*, 572 F. Supp. 2d 726, 777 (E.D. Tex. 2008), *rev’d*, 601 F.3d 354 (5th Cir. 2010).

142. *United States v. Texas*, 601 F.3d 354, 371-72 (5th Cir. 2010).

143. See *Castañeda v. Pickard*, 648 F.2d 989, 998 (1981) (“[A] practice which actually groups children on the basis of their language ability and then identifies these groups not by a description of their language ability but with a general ability label is, we think, highly suspect.”).

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grouping that uses English language ability as a determining factor is, at best, objectionable.<sup>144</sup> In particular, English language proficiency and intellectual capacity are not one and the same and should not be used interchangeably.<sup>145</sup> A student that lacks proficiency in English should not be excluded from the opportunity to take part in advanced courses in mathematics, science, or social science. Additionally, advanced placement (“AP”) courses are, for many colleges, becoming the norm for admissions considerations.<sup>146</sup> That ELLs are in large part excluded from such programs again leaves many in a position from which they are unable to compete with their non-ELL counterparts in a post-high school world.<sup>147</sup>

Moreover, the Fifth Circuit’s assessment of the problems creating a lack of achievement for ELLs seems to be in direct contrast to the Supreme Court’s statements in *Lau* when it rejected the Ninth Circuit’s rationale that the students’ failure was due to the disadvantages that they brought with them to the classroom.<sup>148</sup> For the court to dismiss the failure rates of secondary students based on their “particular” challenges seems counter-intuitive to its characterization of educators as experts in their field and contrary to *Lau*’s intent (and indeed its express language).<sup>149</sup>

The Fifth Circuit, in *U.S. v. Texas*, stated that although it is true that TEA’s secondary student data is “alarming,”<sup>150</sup> the secondary students make up “only some 20% of the total LEP population.”<sup>151</sup>

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144. *Id.* (stating that although ability grouping is not per se constitutional, grouping practices that confuse language and intelligence and inaccurately label ELL students as “low ability” may be evidence of a discriminatory intent to stigmatize such children as inferior).

145. *Id.*

146. Liam Migdail-Smith, *Advanced Placement Courses Move from Nice Add-on to Norm on College Resumes*, PENNLIVE.COM (Jan. 3, 2011), [http://www.pennlive.com/midstate/index.ssf/2011/01/advanced\\_placement\\_courses\\_mov.html](http://www.pennlive.com/midstate/index.ssf/2011/01/advanced_placement_courses_mov.html) (“AP courses carry weight over honors classes on applications because they’re standardized across the board . . . . College admissions officers know what’s in an AP course because it’s set by the College Board, versus an honors course that varies from school to school.”).

147. Neal Finkelstein et al., NAT’L HIGH SCH. CTR., *HIGH SCHOOL COURSE-TAKING PATTERNS FOR ENGLISH LANGUAGE LEARNERS: A CASE STUDY FROM CALIFORNIA 1* (Apr. 2009), [http://www.betterhighschools.org/docs/HSCourse-takingPatternsforELLs\\_042309.pdf](http://www.betterhighschools.org/docs/HSCourse-takingPatternsforELLs_042309.pdf) (“Based on the sample analyzed, by the time English language learners complete high school, the majority will not be able to matriculate to a 4-year public university in California without remediation.”).

148. *Lau v. Nichols*, 414 U.S. 563, 788 (1974) (“[We reject the Ninth Circuit’s reasoning that e]very student brings to the starting line of his educational career different advantages and disadvantages caused in part by social, economic and cultural background, created and continued completely apart from any contribution by the school system.”).

149. *Id.*

150. *United States v. Texas*, 601 F.3d 354, 370 (5th Cir. 2010).

151. *Id.*

This, the court reasons, demonstrates that the district court overemphasized the significance of these students' achievement scores.<sup>152</sup> So it would appear that the test for whether a group of students is receiving their due equal educational opportunity is dependent upon the number of students in the group. Should we then only be alarmed when our school system fails large subgroups of students in the nation? The stakes for students who are failed at the high school level increase significantly. It has been shown that failure to graduate from high school reduces economic opportunity for the students themselves and increases costs on the larger society through increased need for government assistance and increased likelihood of entry into the criminal justice system.<sup>153</sup> If 20% of any population is at an increased risk of failure, it would seem that the significance should be great.

In addition, few would argue that achievement scores on standardized tests should be the only determinant of whether students are achieving; however, the district court had considered various factors in making its determination that TEA was failing to meet its obligations.<sup>154</sup> Most problematic though is the shifting of the burden to plaintiffs to somehow prove a negative: that their inability to achieve at expected levels is not due to some factor outside of the school's failure to implement an effective program. Judge Justice addressed this in his 2008 decision, stating "other courts have recognized the limitations of standardized test scores, but none have required plaintiffs in a 1703(f) action to prove or disprove potential alternative causes."<sup>155</sup> Without doubt there are multiple factors that coalesce in impacting students' educational outcomes, but to require plaintiffs to control for such variables creates an impossible hurdle for plaintiffs to

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152. *Id.*

153. See generally ALLIANCE FOR EXCELLENT EDUC., THE HIGH COST OF HIGH SCHOOL DROPOUTS: WHAT THE NATION PAYS FOR INADEQUATE HIGH SCHOOLS (Oct. 2007), <http://www.all4ed.org/files/archive/publications/HighCost.pdf> (noting the societal costs resulting from students dropping out of high school).

154. *United States v. Texas*, 572 F. Supp. 2d 726 (E.D. Tex. 2008), *rev'd*, 601 F.3d 354 (5th Cir. 2010) (considering various factors such as retention rates for ELLs, exclusion from advanced placement classes, success in bilingual programs, under-identification of ELLs, certification of monitors and teachers, and aggregation of data in making a determination that the district had failed to meet its § 1703(f) obligations).

155. *Id.* at 772 (citing *Teresa P. v. Berkeley Unified. Sch. Dist.*, 724 F. Supp. 698, 715, 716 n.2 (N.D. Cal. 1989)).

surmount.<sup>156</sup> And, to restate, the *Lau* Court expressly declined to accept this reasoning.<sup>157</sup>

B. Faulty Assumptions and False Presumptions

1. Older Students Can't Learn Language as Well as Younger Students

Not only are the Court's conclusions in *Horne* and the subsequent Fifth Circuit decision in *U.S. v. Texas* troubling because of the impact they have on plaintiffs' burden of proof, the decisions are troubling because they are based on faulty assumptions.

First, the Court presumes that the achievement gap can be, at least in part, explained by the "difficulty of teaching English to older students."<sup>158</sup> But language acquisition theorists have long questioned this widely held assumption that older students are less adept at learning a new language.<sup>159</sup> In fact, "there is no truly critical age for language learning."<sup>160</sup> Although research has shown that accent may be an area in which the relative youth of a language learner may improve performance,<sup>161</sup> recent research has also shown that older students are actually more efficient learners because typically an older student has more linguistic knowledge upon which to build.<sup>162</sup>

Part of the misconception about the heightened difficulty of teaching language to older students has to do with the fact that younger students have far fewer and much less complex words to master in order to attain age-appropriate fluency.<sup>163</sup> In addition to

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156. See Black, *supra* note 120, at 17 ("The *Castañeda* standard affords districts so much discretion that plaintiffs are unable to establish that a district's program—even a poor one—is the cause of the educational failure . . . . [E]ven a state's refusal to significantly support ELL programs will go unchecked unless a plaintiff can control for numerous variables and causally connect state policy to student outcomes.").

157. See discussion *supra* Part II.A (stating that the court in *Lau* placed on the state the responsibility of rectifying language deficiencies, even though the state has the authority to choose the education policy it sees fit).

158. *Horne v. Flores*, 129 S. Ct. 2579, 2605 n.20 (2009).

159. See, e.g., NAT'L CENTER FOR RES. ON CULTURAL DIVERSITY & SECOND LANGUAGE LEARNING, MYTHS AND MISCONCEPTIONS ABOUT SECOND LANGUAGE LEARNING: WHAT EVERY TEACHER NEEDS TO UNLEARN (1992), [http://www.cal.org/resources/digest/digest\\_pdfs/myths.pdf](http://www.cal.org/resources/digest/digest_pdfs/myths.pdf) [hereinafter MYTHS AND MISCONCEPTIONS].

160. GÁNDARA & CONTRERAS, *supra* note 34, at 139.

161. As Barry McLaughlin and others have theorized, this is likely due to the "fossilization" of motor patterns being more developed in older learners as well as a lack of strong teaching of phonology in second language acquisition. BARRY McLAUGHLIN, MYTHS AND MISCONCEPTIONS ABOUT SECOND LANGUAGE LEARNING: WHAT EVERY TEACHER NEEDS TO UNLEARN 6 (1992).

162. GÁNDARA & CONTRERAS, *supra* note 34, at 139.

163. *Id.*; MYTHS AND MISCONCEPTIONS, *supra* note 159, at 8; see also Hakuta, *supra* note 4.

the relative difficulty of mastering language at a more advanced level, older students face a greater need to read and write at a more frequent and complex level.<sup>164</sup> James Cummins has divided language acquisition into two types that continue to be accepted by educators today.<sup>165</sup> Basic interpersonal communicative skills (“BICS”) are demonstrated by an ability to speak and interact at a seemingly fluid level, while cognitive/academic language proficiency requires a deeper level of language acquisition.<sup>166</sup> For younger students, BICS is often the greater part of what is required in order to establish mastery.<sup>167</sup> At older grade levels, students are required to demonstrate a much higher level of mastery. Older students are required to think and write analytically and critically on a variety of subject matters. It is theorized that the gap between an ELL’s ability to achieve proficiency on assessments designed for measuring English acquisition and state standards tests is that such proficiency assessments focus to a greater extent on BICS, while standardized tests require a higher level of language mastery for which most ELLs are ill-prepared.<sup>168</sup>

## 2. Secondary ELL Failure is Due to Prevalence of Gangs and Drugs

Also while it may be true that older students face greater social challenges than younger students, such challenges are faced by most if not all students as they reach adolescence and beyond. Recent studies have shown that the drop in student achievement—even those who have historically done well—affects varied populations.<sup>169</sup> Without doubt, there are communities who are harder hit than others by gang activities. But there is growing acknowledgment that much of the perception that students of color are more prone to misbehavior and criminal activity is based on cultural bias.<sup>170</sup> The U.S. Department of

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164. See GÁNDARA & CONTRERAS, *supra* note 34, at 139.

165. *Id.* at 136.

166. *Id.*

167. *See id.* at 139.

168. *Id.*

169. *See, e.g.*, Shah, *supra* note 105 (citing a study by the Thomas B. Fordham Institute finding that of nearly 82,000 students tested, of those who tested in the 90th percentile as third graders, only 57.3% did as well by the time they reached the eighth grade).

170. *See generally* Anne Gregory, Russell J. Skiba & Pedro A. Noguera, *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 EDUC. RESEARCHER 1, 59-68 (2010), available at [http://www.aera.net/uploadedfiles/publications/journals/educational\\_researcher/3901/059-068\\_02edr10.pdf](http://www.aera.net/uploadedfiles/publications/journals/educational_researcher/3901/059-068_02edr10.pdf) (synthesizing research on racial and ethnic patterns in school sanctions and discussing how disproportionate discipline might contribute to lagging achievement among students of color).

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Education and the Executive branch are currently investigating the disparate treatment of minority students in schools.<sup>171</sup> This data shows that black and Hispanic youth are more frequently and more harshly disciplined than white students despite a lack of evidence showing that minority students misbehave more frequently than white students.<sup>172</sup> This correlation is not accounted for on the basis of socio-economic status of students of color, leading many to conclude that such disparities are based on structural racial bias that permeates the education and juvenile justice systems.<sup>173</sup>

These misperceptions about the delinquency of minority youth extend to general misconceptions about gang activity. For example, in 1997, California implemented a database for the collection of information gathered from Field Interview cards (“FI” cards) completed by police officers, often after routine stops without probable cause.<sup>174</sup> By the year 2000, the database contained information on more than 250,000 individuals, of whom nearly 90% were minority youth.<sup>175</sup> Many of these FI cards are gathered simply by stopping youths within a certain “gang neighborhood.”<sup>176</sup> But often in these neighborhoods, young people are mislabeled as gang “associates” simply because they have friends, neighbors, and family members who may be gang members.<sup>177</sup> In reality, these youths are simply wearing the color that keeps them safest in their neighborhood, or merely hanging out with the people they have known and lived with for their entire lives.<sup>178</sup>

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171. See Mary Ann Zehr, *Obama Administration’s ‘Disparate Impact’ Policy Draws Criticism*, EDUC. WK. (Feb. 15, 2011), available at [http://www.edweek.org/ew/articles/2011/02/15/21\\_civilrights.h30.html](http://www.edweek.org/ew/articles/2011/02/15/21_civilrights.h30.html); Press Release, U.S. Comm’n on Civil Rights, U.S. Commission on Civil Rights to Hold Briefing on School Discipline and Disparate Impact (Feb. 7, 2011), <http://www.reuters.com/article/2011/02/07/idUS191203+07-Feb-2011+PRN20110207>; see also ADVANCEMENT PROJECT, EDUCATION ON LOCKDOWN: THE SCHOOLHOUSE TO JAILHOUSE TRACK 18 (2005), available at [http://www.advancementproject.org/sites/default/files/publications/FINAL\\_EOLrep.pdf](http://www.advancementproject.org/sites/default/files/publications/FINAL_EOLrep.pdf).

172. ADVANCEMENT PROJECT, *supra* note 171, at 18-19.

173. *Id.*; see also Edgar Cahn & Cynthia Robbins, *An Offer They Can’t Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives that Work*, 13 UDC/DCSL L. REV. 71, 80 (“[T]he information that does exist strongly suggests that racial bias accounts for disproportionate treatment at each stage of the juvenile delinquency process . . . .”); Lesli A. Maxwell, *Civil Rights Office Expands its Reach into Schools*, EDUC. WK. (Dec. 13, 2011), [http://www.edweek.org/ew/articles/2011/12/14/14ocr\\_ep.h31.html?tkn=XVYFLi7czpnstI%2BG4gWVmsJ0dxsHM9Yhz%2Fm&cmp=ENL-EU-NEWS1](http://www.edweek.org/ew/articles/2011/12/14/14ocr_ep.h31.html?tkn=XVYFLi7czpnstI%2BG4gWVmsJ0dxsHM9Yhz%2Fm&cmp=ENL-EU-NEWS1).

174. Erin R. Yoshino, Note, *California’s Criminals Gang Enhancements: Lessons from Interviews with Practitioners*, 18 S. CAL. REV. L. & SOC. JUST. 117, 127-28 (2008) (citing YABLONSKY, *supra*, note 110, at 130).

175. *Id.* at 127-28; YABLONSKY, *supra* note 110, at 130.

176. See Yoshino, *supra* note 174, at 127.

177. YABLONSKY, *supra* note 110, at 120.

178. *Id.*; Yoshino, *supra* note 174, at 129-30.

They are young people like Agustín who are not gang members, but who live in neighborhoods where it would be nearly impossible not to associate with those who are.

Furthermore, it is true that achievement has been correlated to both race and socioeconomic status, but to conclude that this correlation is based on a difference in ability requires an inferential step that we should be loathe to take. In both *U.S. v Texas* and *Horne v. Flores*, the majority of students about whom the courts speak, are Latino. Unless we are willing to state that immigrant students, and Latino students in particular, are less able to learn and more prone to engage in gang and drug activity, the Court's decision, and the Fifth Circuit's adoption of it, are incorrect as concerns the causes for the persistent gap between ELL and non-ELL student performance and the lack of progress for ELLs in English in general.

Even more significant, statistics show that upwards of 80% of students classified as ELL were actually born in the United States.<sup>179</sup> That so many of these students have been schooled within the United States and yet continue to underperform in so many areas underscores the need to seek out a new measure by which to judge school compliance. Despite the Court's presumption that ELL students at the high school level were "not in English-speaking schools as younger children," data shows that in reality, the majority of ELLs are natives of the United States.<sup>180</sup> According to the data, more than 65% of ELLs were born in the United States or its territories.<sup>181</sup> Another study reports that 57% of adolescent ELLs were born in the United States.<sup>182</sup> Of these students, 27% are second-generation immigrants and 30% are third-generation.<sup>183</sup> Many ELL students, in fact, are not highly literate in the language of their parents or grandparents.<sup>184</sup>

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179. Gándara & Hopkins, *supra* note 25, at 12-13. Narrowly defining particularly Latino students as either ELL or fluent English proficient fails to reflect the "continuum between these two extremes: from speaking English as their first or primary language and being exposed to Spanish in the home or community, to speaking no English and living in a linguistically segregated, Spanish-only setting." See GÁNDARA & CONTRERAS, *supra* note 34, at 124.

180. *Horne v. Flores*, 129 S. Ct. 2579, 2605 n.20 (2009); Gándara & Hopkins, *supra* note 25, at 12-13 and accompanying discussion.

181. Swanson, *supra* note 19, at 14.

182. NAT'L COUNCIL OF TEACHERS OF ENGLISH, ENGLISH LANGUAGE LEARNERS: A POLICY RESEARCH BRIEF 2 (2008), available at <http://www.ncte.org/library/NCTEFiles/Resources/PolicyResearch/ELLResearchBrief.pdf>.

183. *Id.*

184. See Sharon Vaughn, *Response to Intervention in Reading for English Language Learners*, RTI ACTION NETWORK, <http://www.rtinetwork.org/learn/diversity/englishlanguagelearners> (last visited Feb. 29, 2012).



### *Burden Shifting and Faulty Assumptions*

Though many continue to categorize ELL students strictly as newcomers, in reality, most of our ELL students were, like Agustín, born in the United States, have been raised in our communities, and have attended our schools in the country of their birth.<sup>185</sup> It is within our schools that the majority of these young people have been unable to attain English proficiency. And though it is true that many of our English Learners are LTELLs, ELLs are not a homogenous group of students. There are students from affluent, middle class backgrounds, students from rural communities, students with parents with post-graduate degrees, and those with interrupted schooling due to families migrating for agricultural work.<sup>186</sup>

These misconceptions and incorrect assumptions about ELLs—that they are all foreign-born, that older students are less able to learn, and that they are more prone to delinquent behaviors—are not borne out by the data. Additionally, the Court’s acceptance of these erroneous and under-supported beliefs has created the basis for what has become a shifting of the burden of establishing program effectiveness. Where schools were once required to demonstrate the effectiveness of their programs, not only the choice and implementation, but the program’s *effectiveness*, secondary plaintiffs are now required to show that their lack of educational opportunity is not caused by factors external to the school.<sup>187</sup> Judge Justice cautioned against this outcome in his 2008 decision stating:

Examining such nebulous factors as social and economic background as potential primary causes of LEP student failure is a task fraught with hazard. Too often, apologists pursue such ulterior causes to extenuate prejudice. In contrast, Congress passed the EEOA under the authority of § 5 of the Fourteenth Amendment and enacted it in the shadow government endorsed discrimination that frequently perpetuated social inferiority and economic depression towards the end of racial oppression.<sup>188</sup>

Though it would appear that, to an extent, Judge Justice’s prophecy has rung true, the following section presents various suggestions

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185. See *supra* note 182 and accompanying text.

186. See generally LIBIA GIL & SARAH BARDACK, ENGLISH LANGUAGE LEARNER CTR., AM. INSTS. FOR RESEARCH, COMMON ASSUMPTIONS VS. THE EVIDENCE: ENGLISH LANGUAGE LEARNERS IN THE UNITED STATES (2010), available at [http://www.air.org/files/ELL\\_Assumptions\\_and\\_Evidence.pdf](http://www.air.org/files/ELL_Assumptions_and_Evidence.pdf) (deconstructing the myths and misconceptions about ELLs, including the belief in their homogeneity).

187. *Horne v. Flores*, 129 S. Ct. 2579, 2605 n. 20 (2009) (2009).

188. *United States v. Texas*, 572 F. Supp. 2d 726, 773 (E.D. Tex. 2008), *rev'd*, 601 F.3d 354 (5th Cir. 2010).

for ensuring that school ELL programs are measured based on what they offer to students considering what strengths and challenges these students bring with them to the classroom, rather than continuing down the hazardous path Judge Justice cautions against.

#### IV. RECOMMENDATIONS: IN THE LONG RUN AND IN THE MEANTIME

The problems underlying the problematic effect of *Horne* are complex and require less than simple solutions. In the end, the EEOA should be redrafted. With the knowledge that a redraft of the EEOA will likely take years, in addition to addressing such a redraft of the Act, the following offers a series of possible fronts on which to address the issues (particularly those facing secondary ELLs) in the meantime.

Within the courts, future claims should be brought with challenges to the districts' experts in mind. Plaintiffs' experts should present testimony to rebut potential unsupported statements as to external causes for ELL student failure. If a district expert states that drugs and gangs are "endemic" to a specific school or district, or that older students can't learn as well as younger students, he should be required to prove such statements through the use of data supporting such conclusions. Further, they should be required to demonstrate that such realities preclude the school's ability to run a successful program. And such testimony should be rebutted by plaintiffs' experts who are knowledgeable in the areas of language acquisition in older students, and the intricacies of gang-related culture. Courts should be required to weigh the competing testimony instead of taking a district's experts as the ultimate authority.

Again, as has been argued by many, the EEOA is in need of redrafting.<sup>189</sup> Though it has provided recognition of the rights of English Learners, it has proven unable to enforce equal educational opportunity for this growing number of students. Because Congress left "appropriate action" under the EEOA largely open to interpretation, courts have proven unable to define what exactly should be examined when looking at program effectiveness under the EEOA.<sup>190</sup> Although *Castañeda* provided a framework for such analysis, it is clear

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189. See, e.g., Jessica R. Berenyi, "Appropriate Action," *Inappropriately Defined: Amending the Educational Opportunities Act of 1974*, 65 WASH. & LEE L. REV. 639 (2008).

190. See *supra* note 46 and accompanying text.

### *Burden Shifting and Faulty Assumptions*

that even that attempt at clarification has fallen short. The EEOA needs to be revisited and should include specific criterion by which to judge program effectiveness. In this way, ambiguities with regard to causation may become less of a barrier to students receiving needed services. Particularly with respect to secondary ELL programs, there are certain pieces that should be considered vital to any program setting itself out as effective.

It has been argued as one possible solution that EEOA compliance should be tied to successful achievement of standards implemented as a mandate of No Child Left Behind (“NCLB”).<sup>191</sup> Though NCLB has been effective at providing some recognition for the needs and rights of ELLs,<sup>192</sup> NCLB has proven to be ineffective at achieving its stated goals.<sup>193</sup> Thousands of schools have been labeled as failing under the statute’s proficiency requirements, leaving some schools and districts desperate to manipulate benchmarks and results in order to avoid federal sanctions.<sup>194</sup> Furthermore, standardized tests measuring language proficiency, at best, measure only a portion of what constitutes proficiency in any true sense. Student retention rates, demonstrated critical thinking skills, post-high school opportunity, and inclusion in advanced placement and other school programs are only some of the factors that also contribute to true equality of educational opportunity.

*Lau* was decided under Title VI of the Civil Rights Act of 1964, which after *Alexander v. Sandoval*,<sup>195</sup> no longer provides a private right of action for disparate impact, but does permit agencies to construct regulations against activities that would have a discriminatory effect even if permissible under § 601 of Title VI as lacking invidious intent.<sup>196</sup> This leaves open the possibility for a federal agency, such as

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191. See Jeffrey Mongiello, *The Future of the Equal Educational Opportunities Act § 1703(f) After Horne v. Flores: Using No Child Left Behind Proficiency Levels to Define Appropriate Action Towards Meaningful Educational Opportunity*, 14 HARV. LATINO L. REV. 211, 213 (2011).

192. See CLEMENCIA COSENTINO DE COHEN & BEATRIZ CHU CLEWELL, EDUC. POLICY CTR., PUTTING ENGLISH LANGUAGE LEARNERS ON THE EDUCATIONAL MAP: THE NO CHILD LEFT BEHIND ACT IMPLEMENTED 1 (2007), [http://www.urban.org/UploadedPDF/311468\\_ell.pdf](http://www.urban.org/UploadedPDF/311468_ell.pdf).

193. See Black, *supra* note 120, at 34.

194. Sam Dillon, *Bill Would Overhaul No Child Left Behind*, N.Y. TIMES, Oct. 12, 2011, at A14; Alan Schwarz, *Atlanta School Year Begins Amid a Testing Scandal*, N.Y. TIMES, Aug. 7, 2011, at A11.

195. *Alexander v. Sandoval*, 535 U.S. 274, 275 (2001).

196. *Id.* at 281-82 (stating that although the Court to date had not so held, in *Guardians Association v. Civil Serv. Comm’n of the City of New York*, 463 U.S. 582 (1983), five Justices stated this could be alternative grounds for their holding).

the Department of Education, to create more stringent protections under Title VI against the sort of disparate impact apparent in the steady lack of progress among ELLs. Further, such agency regulations would allow for clearer criterion upon which to judge program effectiveness. If a state is required to demonstrate certain steps taken and program components considered and implemented, it is less likely that the causal gaps discussed above would swallow up ELL student plaintiffs' legitimate claims.<sup>197</sup>

Whether by a redraft of the EEOA, or through regulations promulgated by the Department of Education, educational agencies should be given clear and explicit guidance as to what is expected of effective ELL programs. Currently this is done at the state level, and federal agencies do monitor and assess programs, but with many of these claims reaching federal courts, more direction needs to be given so that courts can make valid assessments that keep the burden on the defendant school district to demonstrate that they have indeed met the required standards for an effective program. At the high school level, one consideration should be whether a district's chosen program prohibits students from completing prerequisites for college or university.<sup>198</sup>

Also, while the current push is to set unrealistic limits of, sometimes, as little as two years for a student to reach English proficiency,<sup>199</sup> what can at least be measured is whether students are progressing toward proficiency. In order to measure this progress, longitudinal data must be collected and analyzed. Data on student achievement and progress cannot be analyzed without a more complete picture of the student. Students' date of entry into U.S. schools should be included in any analysis of their progress. A student who entered U.S. schools in the eighth grade and tests at proficient in the tenth grade on ELL assessments can be considered a success. But looking at a student who has been in U.S. schools since kindergarten and is still being measured by ELL assessments requires a very differ-

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197. See *supra* text accompanying notes 119-21.

198. See Finkelstein et. al, *supra* note 147.

199. See, e.g., ARIZ. REV. STAT. ANN. § 15-752 (2000) (Arizona's SEI initiative); CAL. EDUC. CODE § 420 (West 2007) (California's SEI initiative); MASS. GEN. LAWS ANN. ch. 71A, § 4 (West 2003) (Massachusetts' SEI initiative); TEX. EDUC. CODE ANN. § 29.055 (West 1995) (Texas' SEI initiative). But see, e.g., Kenji Hakuta, Workshop Presentation at Stanford University: Population Characteristics, Social Goals, and Educational Treatments for English Language Learning Students (Oct. 14, 1999), available at <http://www.stanford.edu/~hakuta/www/docs/BOTAForum.PDF> (stating that proficient language acquisition takes upward of five to ten years).

### *Burden Shifting and Faulty Assumptions*

ent response. These factors need to be considered when analyzing student achievement rates.

Academic literacy should also be taught across the curriculum. Teachers in all subject areas should be effectively trained in the use of academic vocabulary.<sup>200</sup> Too often, ELLs are tracked into Structured English Immersion (“SEI”) or English as a Second Language (“ESL”) classes wherein they are not challenged linguistically; instead, these classes focus on language that is barely above the level of BICS.<sup>201</sup> ELL students should be exposed to the same range of coursework and critical thinking skills as other, non-ELL students. Reaching mastery on a state-designed test which measures only basic language skills does not equate to an ability to compete on a level playing field when faced with assessments that require a more sophisticated application of language to a variety of higher-order thinking skills.

Teachers and school and district administrators also need to be trained in cultural competence. Many teachers are faced with significantly changing demographics in schools that many have been in for many years—historically suburban, white, affluent schools have shifted to much more diverse student bodies.<sup>202</sup> A lack of education around the new populations of students filling their classrooms cannot be always blamed on the teachers themselves. As a professor of mine has said, “It would be difficult to remember if it was never taught in the first place.”<sup>203</sup> Teachers and administrators need to become cognizant of the cultural bias that they may, inadvertently, be bringing into their classrooms. But to do so, they need to receive appropriate training and support.

Consideration of these and other factors are well within the ability of Congress and/or the Department of Education to consider and would provide clearer guidance to courts in determining whether a given program is taking appropriate action to overcome language barriers for ELLs.

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200. For more information on the push for academic vocabulary across the curriculum, see generally Dr. Kate Kinsella, SANTA CLARA CNTY. OFFICE OF EDUC., <http://www.sccoe.org/depts/ell/kinsella.asp> (last updated Oct. 5, 2010).

201. See GANDARA & CONTRERAS, *supra* note 34, at 126, 136; *see also supra* text accompanying note 34.

202. See Swanson, *supra* note 19 and accompanying text.

203. Warner Lawson, Jr., Professor of Law, Howard University School of Law.

## CONCLUSION

Although educators are currently under fire,<sup>204</sup> most are in the profession because they believe that they can help their students learn and that they can effect positive change in their students' lives. It should be urged though, that ours is a changing and growing nation. We can no longer afford to teach the students we *imagine* have entered our schools; we have been given the privilege of educating the students who actually *are* in our classrooms. Instead of shirking the responsibility for secondary ELL program failure, the issue should be tackled head-on. This requires acknowledgement that many of the assumptions about the lack of achievement in ELL programs may be based on false assumptions and institutional bias.

Perhaps high school kids are not as cute as elementary school kids. Their problems often grow in proportion to their age. We have come to hold schools less accountable for providing an equal educational opportunity once students, particularly English learners, become adolescents. But this is contrary to both statutory and case law that has been established over the past four-and-a-half decades. The responsibility for providing a meaningful education should fall to the adults in the room: educators, policy makers, and parents. And the courts should be provided the appropriate measures by which to assess school effectiveness. Students come with varied needs, more often than not with a readiness to learn, and sometimes with a desire to change their lives. When faced with the question of how exactly to do that, we should be able to confidently tell them they can do that through education. They are ready to learn—if we will teach them.

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204. See, e.g., WAITING FOR SUPERMAN (Electric Kinney Films 2010) (showing an array of failures in education stemming often from poor teaching). For a sympathetic perspective on the challenges teachers face, see generally Christine Emmons, Commentary, *No Teacher is an Island*, EDUC. WK., Apr. 6, 2011, at 36, 44.

## COMMENT

# Irreparable Harm in Patent, Copyright, and Trademark Cases after *eBay v. Mercexchange*

AURELIA HEPBURN-BRISCOE\*

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\* J.D. Candidate, Howard University School of Law, May 2012. I would like to thank God for giving me the strength, dedication, and focus to complete this Comment. I am also deeply grateful to my family for inspiring me to achieve, especially my grandfather, Edwin Foster, who taught me that I could be educated as long as I was willing to learn. Sincere thanks to all the many eyes and hands that helped to make this Comment “flawless.”

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### INTRODUCTION

If you were Steve Jobs,<sup>1</sup> the Chief Executive Officer of Apple, Inc., it is likely that you would require frequent updates from your staff on the status of your intellectual property portfolio. At Apple, one of the most recognized and revered brands in the world, your trademark is worth approximately \$83 billion dollars, your patents also worth more than a billion dollars, with innovation being the key to much of the company’s success, and your copyrights adding to that running total.<sup>2</sup> While each of these forms of intellectual property can be monetarily valued through common business practices, however, Apple’s intellectual property portfolio some might consider priceless, as it took the company several decades and customer goodwill to create the brand. This is why Apple guards each one of these forms of intellectual property so closely and why it often asserts its exclusive right to use each by suing those who infringe on that rights.<sup>3</sup>

With patents, trademarks, and copyrights being so valuable to companies like Apple, the standard courts use to ensure the protection of the patent to the touch screen technology in the iPhone should be no different than it would be to protect the highly recognized bit-

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1. Tim Cook is the current CEO of Apple, Inc., Steve Jobs was used for literary value.  
2. BRANDZ, BRANDZ TOP 100 MOST VALUABLE GLOBAL BRANDS 2010, at 16 (2010), [http://c1547732.cdn.cloudfiles.rackspacecloud.com/BrandZ\\_Top100\\_2010.pdf](http://c1547732.cdn.cloudfiles.rackspacecloud.com/BrandZ_Top100_2010.pdf).  
3. See generally *Apple, Inc. v. High Tech Computer Corp.*, No. 10-166-GMS, 2011 WL 124446 (D. Del. Jan. 14, 2011) (dealing with Apple’s patent infringement action against High Tech Computer Corp. (“HTC”) alleging that HTC’s smart phone technology infringes twenty Apple patents); *Apple, Inc. v. Samsung Elecs., Co.*, 768 F. Supp. 2d 1040 (N.D. Cal. 2011) (reviewing Apple’s suit against Samsung alleging that Samsung’s Galaxy cell phones and computer tablets infringe Apple’s trade dress, trademarks, and utility and design patents); *Apple Computer, Inc. v. Formula Int’l Inc.*, 562 F. Supp. 775 (C.D. Cal. 1983) (detailing Apple’s suit against defendant, Formula, for copyright infringement when defendant commenced the sale of a computer kit under the trade mark “Pineapple”).



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ten apple trademark or the copyright in their desktop icons—each is of considerable value to the company. Several district courts have done just that, varied the standard of proof, for protection of the different forms of intellectual property based on a misapplication or misunderstanding of the Supreme Court’s opinion in *eBay v. MercExchange*.<sup>4</sup>

Article I, Section 8, Clause 8 of the United States Constitution provides that “Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries. . . .”<sup>5</sup> The meaning of this exclusive right has been the subject of debate in recent years as technology moves at a pace that could never have been imagined by the Framers of the Constitution.<sup>6</sup> Based on this exclusive right provided by the Constitution, the First Congress enacted the Patent Act of 1790, which granted inventors “the sole and exclusive right and liberty of making, constructing, using and vending to others to be used” their invention or discovery.<sup>7</sup> In 1952, the Patent Act was amended to its current form, where now an inventor has the right to “exclude others from making, using, offering for sale, or selling the invention. . . .”<sup>8</sup> This amendment to the Patent Act was intended to clarify the meaning of exclusive rights, which are thought to be the rights the patent owner has to exclude others.<sup>9</sup> However, the debate as to the amendment’s true meaning has recently been renewed after the landmark Supreme Court case of *eBay v. MercExchange*.<sup>10</sup>

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4. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

5. U.S. CONST. art. 1, § 8, cl. 8. The inclusion of an exclusive right to authors and inventors suggests that intellectual property has always been something worth protecting.

6. See generally James M. Fischer, *The “Right” to Injunctive Relief for Patent Infringement*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1 (2007) (asserting that patentees in “patent troll” litigation should be compensated with damages, not injunctions, leaving them with no right to exclude); Yixin H. Tang, *The Future of Patent Enforcement After eBay v. MercExchange*, 20 HARV. J.L. & TECH. 235 (2006) (arguing that the Court’s holding in *eBay* “implicitly disposed of any common-law property-right moorings patents may have had”).

7. Patent Act of 1790, ch. 7 § 1, 1 Stat. 109-112; see also Elizabeth E. Millard, *Injunctive Relief in Patent Infringement Cases: Should Courts Apply a Rebuttable Presumption of Irreparable Harm After eBay Inc. v. MercExchange, L.L.C.?*, 52 ST. LOUIS U. L.J. 985, 991 (2008).

8. 35 U.S.C. § 154(a)(1) (2006); see also Millard, *supra* note 7, at 991. The Patent Act has gone through several changes since its enactment in 1790; however, since 1952 the statutory language has been left relatively unchanged. See Ladas & Parry, LLP, *A Brief History of the Patent Law of the United States*, <http://www.ladas.com/Patents/USPatentHistory.html> (last visited Mar. 9, 2012).

9. 35 U.S.C. § 154(a)(1); see also Millard, *supra* note 7, at 991.

10. See Millard, *supra* note 7, at 992. Several scholarly legal articles have been published on the topic, many of which are cited in this Comment. See, e.g., sources cited *supra* notes 7, 8.

While the United States Court of Appeals for the Federal Circuit has jurisdiction over appeals from patent infringement claims,<sup>11</sup> the Supreme Court—as the true court of last resort—has decided several patent cases in recent years.<sup>12</sup> Most recently, public policy concerns have brought the Supreme Court to the forefront of determining the rights and remedies a patent owner may seek.<sup>13</sup> For twenty-five years, the Federal Circuit decided infringement claims based on the general rule that if a patent owner could show likelihood of success on the merits, or had succeeded on the merits of the claim, the court would, as a matter of course, grant a preliminary or permanent injunction.<sup>14</sup> This general rule was directly refuted in *eBay v. MercExchange*, where the Court held that the “traditional principles of equity apply in patent infringement claims, and that a patent owner must prove irreparable harm using the traditional four-factor formula.”<sup>15</sup> The Court went on to articulate the well-known formula, which courts have traditionally applied to all other claims where a party sought an injunction.<sup>16</sup>

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11. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).

12. The Supreme Court has jurisdiction over “all cases in law and equity, arising under the constitution.” U.S. CONST. art. 3, § 2. The Federal Circuit Historical Soc’y, *History of the United States Court of Appeals for the Federal Circuit*, <http://www.federalcircuithistoricalsociety.org/historyofcourt.html> (last visited Oct. 15, 2011). The Supreme Court has decided approximately twenty intellectual property cases in the last ten years. See generally *Bilski v. Kappos*, 130 S. Ct. 3218 (2010) (holding that a concept of hedging risk in the field of commodities trading in the energy market is an unpatentable, abstract idea). Most recently, the Supreme Court held in *Bilski v. Kappos* that many business methods were not patentable subject matter, and most notably that the machine-or-transformation test was not the sole method for determining if the subject matter was patentable, as the Federal Circuit had been applying it. *Id.* at 3226-27, 3329.

13. See generally *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (holding in a unanimous decision that the traditional four-factor equity test must be applied to the grant of injunction).

14. See Millard, *supra* note 7, at 994.

When the Federal Circuit was established in 1982, it developed a general rule that injunctive relief should ordinarily be granted in patent infringement cases once the patent has been found valid and infringed. In *Richardson v. Suzuki Moto Co., Ltd.*, the court stated that “[i]t is the general rule that an injunction will issue when infringement has been adjudged, absent a sound reason for denying it.” Similarly, in *W.L. Gore & Associates, Inc. v. Garlock, Inc.*, the court asserted that “injunctive relief against an adjudged infringer is usually granted,” and “an injunction should issue once infringement has been established unless there is a sufficient reason for denying it.”

*Id.*

15. *eBay*, 547 U.S. at 391.

16. See *id.* (“A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for the injury; (3) that, considering the balance of hardship between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”).

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An injunction is usually sought by the possessor of the right to exclude, whether they are a patent, copyright, or trademark owner.<sup>17</sup> While the facts in *eBay* directly concerned a patent infringement claim, this Comment argues that the Court's opinion should be interpreted broadly so as to apply to all three major types of infringement and both forms of injunctive relief. The Lanham (Trademark) Act, like the Patent Act, gives the owner of a trademark the right to exclude parties from using its mark.<sup>18</sup> Similarly, the language of the Copyright Act confers upon owners the right to exclude others from use of the registered expression of their ideas.<sup>19</sup> Therefore, the holding should be applied broadly to encompass infringement claims under all three Acts and for both permanent and preliminary injunctive relief because both the rights given by each Act and the standards for injunctive relief are similar.

Part I of this Comment provides an introduction to infringement, injunctive relief, and irreparable harm by giving the standards and tests necessary to prove each. It follows that once someone claims or successfully proves infringement they will seek an injunction, whereby they must prove irreparable harm.<sup>20</sup> Part II examines the facts, analy-

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17. David H. Bernstein & John Cerreta, *eBay & the Presumption of Irreparable Harm in Lanham Act False Advertising Cases*, in *HOT TOPICS IN ADVERTISING LAW 2010*, at 45-55 (PLI Intellectual Prop., Course Handbook Series No. 25036, 2010) (“The basis for this presumption is that all intellectual-property rights – patent rights, copyrights and trademark protection – generally include a right to prevent others from exploiting the invention, the work of authorship or the indicator of source.”).

18. *See* Patent Act of 1952, 35 U.S.C. § 154(a)(1) (2006) (“Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, of the right to exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States, and, if the invention is a process, of the right to exclude others from using, offering for sale or selling throughout the United States, or importing into the United States, products made by that process, referring to the specification for the particulars thereof.”); Lanham Act, 15 U.S.C. § 1114(1)(a) (2006).

19. *See* Copyright Act of 1976, 17 U.S.C. § 106(1)-(5) (2006).

[T]he owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; [and] (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

*Id.*

20. 35 U.S.C. § 283 (2006) (“The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable”). An injunction is a remedy to infringement, however in accordance with the principles of equity, irreparable harm must be shown. *See infra* notes 95-97 and accompanying text.

ses, and decisions of the three courts involved in *eBay v. Merckexchange*. Following this discussion, Part III provides a glimpse of the confusion caused by the Supreme Court's ruling in *eBay*. Part IV follows this progression by denoting the confusion by analyzing post-*eBay* litigation. Most notably, Part IV discusses whether the presumption of irreparable harm has survived in copyright, trademark and patent infringement claims where the moving party seeks a preliminary or permanent injunction. Finally, Part V concludes by suggesting that the Court should resolve the conflict by clarifying that the presumption of irreparable harm did not survive *eBay* in any context, and that the traditional four-factor equity test should be applied in all situations where a person seeks injunctive relief.

## I. INFRINGEMENT, INJUNCTIONS, AND IRREPARABLE HARM

A party claiming infringement must first have a valid right to exclude others.<sup>21</sup> The Patent Act allows a patentee to exclude others from “making, using, offering for sale, or selling the invention” without the patentee’s permission for a statutorily determined length of time.<sup>22</sup> In order to establish infringement, a patentee must show: (1) a valid patent and (2) actual infringement.<sup>23</sup> Similarly, in a claim for copyright infringement, an owner must show that “the average lay observer would find a substantial similarity in the two works, recognizing the copy as an appropriation of the copyrighted work . . . [and that] the defendant had access to plaintiff’s work.”<sup>24</sup> In trademark infringement claims, courts use a two-prong test: (1) “whether plaintiff’s mark merits protection” and (2) “whether the defendant’s use of a similar mark is likely to cause consumer confusion.”<sup>25</sup>

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21. See 35 U.S.C. § 154(a)(1); 17 U.S.C. §§ 106-22 (2006); 15 U.S.C. § 1114 (2006).

22. See 35 U.S.C. § 154(a)(1), (2).

23. *Amazon.com, Inc. v. Barnesandnoble.com, Inc.*, 239 F.3d 1343, 1351 (Fed. Cir. 2001).

24. See PASQUALE A. RAZZANO & TIMOTHY J. KELLY, *INTELLECTUAL PROPERTY COUNSELING & LITIGATION* § 65.07 (2010). These two factors, substantial similarity and access to the plaintiff’s work, are the *sine qua non* to a finding of copyright infringement. *Id.*

25. A trademark is a word, phrase, symbol or design, or a combination of words, phrases, symbols or designs that identifies and distinguishes the source of the goods of one party from those of others. *E. Gluck Corp. v. Rothenhaus*, 585 F. Supp. 2d 505, 511 (S.D.N.Y. 2008); USPTO.GOV (last modified Feb. 23, 2012, 4:38:24 PM), [www.uspto.gov/trademarks/index.jsp](http://www.uspto.gov/trademarks/index.jsp); see also 15 U.S.C. § 1114(1)(a). In determining whether a similar mark is likely to cause confusion, courts consider several factors including: the strength of the mark; the degree of similarity; the defendant’s good faith in adopting the mark; and the quality of defendant’s products. *Rothenhaus*, 585 F. Supp. 2d at 512.

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The modern era of infringement has allowed patent, copyright, and trademark owners to exclude others by remedies at law and equitable relief.<sup>26</sup> While a party may choose to only seek monetary damages, most owners wish to maintain their right to exclude the infringing party.<sup>27</sup> In all three forms of infringement claims, an owner usually seeks to enforce its right to exclude by enjoining the infringing party from further use.<sup>28</sup> A party may seek either a preliminary or permanent injunction to elicit this result.<sup>29</sup> Prior to 1952, the remedies available to owners were in dispute.<sup>30</sup>

The majority of federal circuit courts established long ago a four-factor test to determine whether to grant a preliminary injunction in any case.<sup>31</sup> Every court considers similar factors for injunctive relief; however, the weight afforded to each factor may differ greatly among the courts.<sup>32</sup> While some factors vary between circuits, every circuit requires a showing of irreparable harm and, to some degree, a likelihood of success on the merits.<sup>33</sup> The Patent Act permits courts to issue injunctions in patent infringement claims.<sup>34</sup> Specifically, section 283 of the Patent Act states that: “[t]he several courts having jurisdiction of cases under title 35 U.S.C.A. may grant injunction in accordance with the principles of equity to prevent the violation of any

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26. See TERENCE P. ROSS, *INTELLECTUAL PROPERTY LAW: DAMAGES AND REMEDIES* 105 (2005).

27. *Id.* at 105 (“The principal remedy sought in intellectual property litigation is the injunction.”).

28. See *id.* at 108; Bernstein & Cerreta, *supra* note 17.

29. BLACKS LAW DICTIONARY (9th ed. 2009).

30. See Millard, *supra* note 7, at 992. “The statutory language was finally clarified in 1952, when the statute was amended to its current form to provide that a patent empowers its owners “to exclude other from making, using, offering for sale, or selling the invention.” *Id.*

31. See RAZZANO & KELLY, *supra* note 24, § 65.03.

In . . . [the First] Circuit the moving party must establish: (1) that it will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the defendant; (3) that it has established a likelihood of success on the merits; (4) that the public interest will not be adversely affected by the injunction.

*Id.*

The Second Circuit requires “(1) that the injunction is necessary to prevent irreparable harm, and *either* (2) that he is likely to prevail on the merits of the underlying controversy *or* (3)(a) that the presence of sufficiently serious questions going to the merits as to make them fair ground for litigation, and (b) that a balance of hardship tipping [sic] decidedly toward movant.” *Id.* (emphasis in original). Alternatively, the Ninth Circuit requires a moving party to show either “(1) the combination of probable success on the merits and possibility of irreparable injury, or (2) serious questions going to the merits are raised, and that balance of hardships tips sharply in its favor.”

*Id.*

32. *Id.*

33. *Id.*

34. See 35 U.S.C. § 283 (2006); *infra* text accompanying note 40.

right secured by patent, on such terms as the court deems reasonable.”<sup>35</sup> However, it is a readily known remedy principle that an injunction “shall not issue with respect to any infringing product for whose infringement the patentee has been awarded full compensation.”<sup>36</sup>

The primary difference between a preliminary injunction and permanent injunction is that the “preliminary injunction requires a showing of likelihood of success while the permanent injunction requires success as a precondition including infringement.”<sup>37</sup> In most circumstances, a permanent injunction will follow a finding of infringement.<sup>38</sup> The Federal Circuit has repeatedly held that unless there is an extraordinary reason why an injunction should not be granted, an order for a permanent injunction will follow after a finding of infringement.<sup>39</sup> A permanent injunction may not need to issue if, for example, there is very persuasive evidence that there will be no future infringement.<sup>40</sup>

Most recently, in an opinion delivered by Chief Justice Roberts, the Supreme Court held in *Winter v. Natural Resources Defense Council*, that both the Central District of California and the Ninth Circuit Court of Appeals erred in only requiring a “possibility” of irreparable harm, noting that in order for an injunction to issue, a plaintiff must show a “likelihood” of irreparable harm, not just a possibility.<sup>41</sup> The

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35. 35 U.S.C. § 283.

36. 6 JOHN GLADSTONE MILLS III ET AL., PATENT LAW FUNDAMENTALS § 20:65 (3d ed. 2011) (suggesting that if a plaintiff has been awarded money damages and thus made “whole,” they can not also receive an injunction as a second remedy).

37. *Id.*; E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co., 711 F. Supp. 1205, 1227-28 (D. Del. 1989).

38. The Federal Circuit has on several occasions held that “[a]n injunction should issue once infringement has been established unless there is a sufficient reason for denying it.” See *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552, 1564-65 (Fed. Cir. 1984).

39. *Id.*; *supra* note 36 and accompanying text.

40. *Id.*; see also *W.L. Gore & Assocs. V. Garlock, Inc.*, 842 F.2d 1275, 1281 (Fed. Cir. 1988) (holding that defendant had not shown enough evidence to persuade the court that a permanent injunction should not issue).

41. See *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 21-22 (2008). This case involved several environmental organizations who were concerned that the Navy’s use of sonar technology in training exercises would cause serious harm to various species of marine mammals. *Id.* at 12. These organizations sought a preliminary injunction based on alleged violations of the National Environmental Policy Act, the Endangered Species Act, the Administrative Procedure Act, and the Coastal Zone Management Act. *Id.* at 16-17. The United States District Court for the Central District of California granted the motion for preliminary injunction; the Ninth Circuit Court of Appeals affirmed. *Id.* at 17, 19. The Supreme Court reversed, reiterating that in considering an injunction, a court must apply the traditional four-factor test. *Id.* at 32.

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Court found the Ninth Circuit's application of the "possibility" of irreparable harm to be "too lenient."<sup>42</sup>

As alluded to in *Winter*, irreparable harm is an important requirement in the injunction analysis.<sup>43</sup> Accordingly, this remedy should only be exercised "when intervention is essential to protect property or other rights from irreparable injury."<sup>44</sup> The weight given to irreparable harm, however, is only calculated based on the harm incurred during the period between the request for the injunction and the final ruling in the case.<sup>45</sup> It is not mandatory that a court issue an injunction, even if irreparable harm is shown; the order remains within the court's discretion.<sup>46</sup> This discretion will often be used when, "despite the threat of imminent and irreparable harm," an injunction is "not the least restrictive means of providing appropriate relief."<sup>47</sup>

II. THE PROCEDURAL JOURNEY OF  
*EBAY V. MERCEXCHANGE*

In 2001, popular online auction websites, eBay.com and Half.com, became the defendants in a lawsuit filed by MercExchange, L.L.C., the assignee of several business method patents, who alleged patent infringement and sought to enjoin eBay from further infringement.<sup>48</sup> MercExchange is a limited liability corporation founded by electrical engineer Thomas G. Woolston.<sup>49</sup> In the spring of 1995, Woolston fashioned a method for creating an online market designed to allow the sale of goods by private individuals, regulated by a central authority to encourage trust amongst buyers and sellers.<sup>50</sup> Three years after his original application, the United States Patent and

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42. *See id.* at 22.

43. *See supra* note 31 and accompanying text.

44. 42 AM. JUR. 2d *Injunctions* § 33.

45. *See id.* This Comment will not discuss mandatory injunctions, which will be granted upon a "showing of a need to prevent 'serious' injury." *Id.*

46. *Id.*

47. *Id.*

48. *See Tang, supra* note 6, at 237. Petitioner eBay operates a popular Internet Web site that allows private sellers to list goods they wish to sell, either through an auction or at a fixed price. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). Petitioner Half.com, now a wholly owned subsidiary of eBay, operates a similar Web site. *Id.*

49. *See* Julia Wilkinson, *The eBay Patent Wars: Interview with MercExchange CEO Thomas Woolston*, AUCTIONBYTES.COM (Sept. 30, 2004), <http://www.auctionbytes.com/cab/abn/y04/m09/i30/s01> (questioning Mr. Woolston on the history of his MercExchange). "When [Mr. Woolston] got out of the service, he started going to evening school at the University of Maryland, studying computer science, then transferred to George Washington University in Washington, D.C., where he studied electrical engineering. Later Woolston went on to get a law degree." *Id.*

50. *See Tang, supra* note 6, at 237 n.7-8.

Trademark Office (USPTO) issued Woolston a patent for the method.<sup>51</sup>

While Woolston's method was being processed by the USPTO, he worked to raise capital to create a functional website, whereby his soon-to-be patented method would serve as the model.<sup>52</sup> While he had dismal luck before the patent was issued, after he received the first of three patents, licensees and ten million dollars in financing followed.<sup>53</sup> After only two years, MercExchange's commercialization efforts had failed.<sup>54</sup> Before this effort faltered, however, eBay expressed interest in procuring MercExchange's patent portfolio.<sup>55</sup> According to the plaintiff, eBay continued to express its interest in acquiring the portfolio by sending litigators to examine the patents, where they even demanded to see confidential patent files.<sup>56</sup> Negotiations, however, never materialized into a purchase of the portfolio.<sup>57</sup> After the failed negotiations, eBay began offering the "Buy-it-Now" feature, which infringed upon MercExchange's '265 patent.<sup>58</sup>

A. United States District Court for the Eastern District of Virginia

The patent claim was first filed in the United States District Court for the Eastern District of Virginia.<sup>59</sup> After a five-week trial,<sup>60</sup> the jury found for MercExchange and awarded damages of thirty-five million dollars.<sup>61</sup> As is typical in infringement cases, after the judgment was rendered in favor of the claimant, MercExchange sought a permanent injunction so as to enjoin the defendants from any future infringement.<sup>62</sup> However, in an atypical ruling, the district court refused

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51. See *id.*; U.S. Patent No. 5,845,265 (filed Nov. 7, 1995) (issued Dec. 1, 1998).

52. See Wilkinson, *supra* note 49.

53. *Id.* "It was like magic within six weeks, we had our first licensee; and within six months, I'd been lured out of the legal profession into the dot-com world," said Woolston. *Id.*

54. *Id.*

55. See Tang, *supra* note 6, at 237.

56. See *id.*

57. See *id.* "They sent outside litigators to come look at our patents," said Woolston. "Red flag #1 was, why are you sending litigators to look at patents why aren't you sending patent attorneys to look at patents?" Wilkinson, *supra* note 49.

58. See Tang, *supra* note 6, at 237.

59. eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

60. See Tang, *supra* note 6, at 237.

61. MercExchange, LLC v. eBay, Inc (eBay II), 401 F.3d 1323, 1326 (Fed. Cir. 2005) ("With respect to damages, the jury found eBay liable for \$ 10.5 million for infringing the '265 patent and \$ 5.5 million for inducing ReturnBuy to infringe the '265 patent. The jury also held Half.com liable for \$ 19 million for infringing the '176 patent and the '265 patent.").

62. See *supra* notes 39-40 and accompanying text.



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to issue the permanent injunction, even after a clear showing of success on the merits.<sup>63</sup>

The district court held that injunctive relief was not warranted.<sup>64</sup> The court attempted to apply the traditional four-factor test to determine whether an injunction should be granted.<sup>65</sup> The decision noted that an injunction does not automatically follow after a finding of infringement.<sup>66</sup> The court relied on its previous decisions in making this determination.<sup>67</sup> As a rule, the court considered the following four questions “(1) whether the plaintiff would be irreparably injured if an injunction did not issue; (2) whether the plaintiff had an adequate remedy at law; (3) whether granting an injunction was in the public interest; and (4) whether the balance of the hardships favored the plaintiff.”<sup>68</sup>

The court acknowledged the four factors; nevertheless, in considering the first factor, the court found that once validity and infringement are proved, irreparable harm will be presumed.<sup>69</sup> While the court acknowledged the presumption, it also examined several factors relevant to the presumption.<sup>70</sup> Specifically, the court looked at “whether the infringer has ceased its infringing activity, whether the patentee has previously granted licenses such that it can be adequately compensated with money damages, whether the patentee has delayed in filing suit and lack of commercial activity on the part of the patentee.”<sup>71</sup> Based on these factors, the court found that defendants had rebutted the presumption by showing that MercExchange was willing to license its technology and therefore could be compensated with money damages.<sup>72</sup>

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63. *Id.*

64. Millard, *supra* note 7, at 998.

65. See *MercExchange, Inc. v. eBay, Inc. (eBay I)*, 275 F. Supp. 2d 695, 711 (E.D. Va. 2003).

66. *Id.* (“In fact, the grant of injunctive relief against the infringer is considered the norm . . . .”); see *supra* note 31-33 and accompanying text.

67. *eBay I*, 275 F. Supp. 2d at 711.

68. *Id.*

69. See *id.* The Federal Circuit endorsed presuming irreparable harm where validity and continuing infringement were clearly established in *Smith Int’l Inc. v. Hughes Tool Co.*, 718 F.2d 1573, 1581 (Fed. Cir. 1983).

70. See *eBay I*, 275 F. Supp. 2d at 711.

71. Millard, *supra* note 7, at 999.

72. See *eBay I*, 275 F. Supp. at 712. The court found that the “evidence of the plaintiff’s willingness to license its patents, its lack of commercial activity in practicing the patents, and its comments to the media as to its intent with respect to enforcement of its patent rights,” were sufficient to rebut the presumption of irreparable harm, and thus a factor weighing against the issuance of a permanent injunction. *Id.*

The court's analysis of the second factor concluded that MercExchange had an adequate remedy at law.<sup>73</sup> Using yet another atypical analysis, the court reasoned that since MercExchange had previously licensed its patent to others and had been willing to license to the defendants, monetary damages would provide sufficient compensation.<sup>74</sup> The district court gave great weight to comments MercExchange made to the media concerning damages and that it had not moved for a preliminary injunction, "reasoning that if MercExchange truly believed that it was being irreparably harmed . . . such a motion would have been appropriate."<sup>75</sup> Taking all these factors into consideration, the court found that monetary damages would be adequate.<sup>76</sup>

According to the district court, factor three weighed evenly in favor of each party.<sup>77</sup> The court found that while the public interest usually favors patentees, a patent owner who does not practice its patent does not serve the public.<sup>78</sup> In discussing whether the public interest would be better served by not granting a permanent injunction to MercExchange, the court also recognized the "growing concern over the issuance of business-method patents."<sup>79</sup>

Finally, the court found that factor four, the balance of hardships, also tipped slightly in favor of eBay.<sup>80</sup> The court explained that if an injunction were granted it would lead to "contempt hearing after contempt hearing" with "extraordinary costs to the parties, as well as considerable judicial resources."<sup>81</sup> The court recognized that if MercExchange were to prevail, eBay would likely begin using a "design-around" which MercExchange would likely contend also infringed the '265 patent.<sup>82</sup> The court found that three of the four injunctive relief factors were in eBay's favor and thus denied

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73. *See id.* at 713 ("While the court is aware that many cases state that monetary damages are typically inadequate because it limits the patent holder from exercising its monopoly power, this is certainly an atypical case.").

74. *See id.* at 712; Millard, *supra* note 7, at 999.

75. *Id.*

76. *Id.* at 715.

77. *Id.* at 713 (noting that the issuance of a permanent injunction favored granting an injunction to protect MercExchange's patent rights just as much as it did not grant it to protect the public's right to use the patented method).

78. *Id.* at 714.

79. *Id.* at 713-14; *see also* *Bilski v. Kappos*, 130 S. Ct. 3218, 3228 (2010).

80. *eBay I*, 275 F. Supp. 2d at 715.

81. *Id.* at 714. The court focused on the amount of contention of the parties, going so far as to state that "[f]rom day one the parties have been unable to agree on anything, in fact, the only agreed stipulation at trial was that this court had subject matter jurisdiction." *Id.*

82. *Id.* at 714; Millard, *supra* note 7, at 1001.

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MercExchange's motion for a permanent injunction.<sup>83</sup> Appeals by both parties were made to the Federal Circuit.<sup>84</sup>

B. Federal Circuit

The Federal Circuit chose to ignore the district court's analysis of the four factors but instead applied the general rule that permanent injunctions will issue once infringement and validity have been shown.<sup>85</sup> Thus, the court reversed the denial of MercExchange's motion for permanent injunction.<sup>86</sup> The court looked to its general rule that a "permanent injunction will issue once infringement and validity have been adjudged" because "the right to exclude recognized in a patent is but the essence of the concept of property."<sup>87</sup> While the court applied its general rule, it noted that an exception to this rule exists where the patent owner refuses to practice its patent, thus "frustrat[ing] an important public need" such as an invention which may aid the public health.<sup>88</sup>

The court found that this circumstance did not fit into the narrow exception, finding that the lower court had not "provid[ed] any persuasive reason to believe this case is sufficiently exceptional to justify the denial of a permanent injunction."<sup>89</sup> The court, in a seemingly short opinion, also dismissed as unpersuasive the district court's focus on the possibility of continuing disputes, MercExchange's willingness to grant licenses, and its failure to move for a preliminary injunction as being irrelevant to the grant of the injunction.<sup>90</sup> Thus, the general rule in favor of granting permanent injunctive relief upon a finding of validity and infringement was applied and the decision of the district court was reversed in favor of MercExchange.<sup>91</sup> Consequently, eBay

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83. See *eBay I*, 275 F. Supp. 2d at 712-15.

84. See *eBay v. MercExchange (eBay II)*, 401 F.3d 1323, 1326 (Fed. Cir. 2005). MercExchange appealed seeking reversal of summary judgment invalidating one its patents and the denial of the permanent injunction, while eBay appealed the denial of their motions for judgment as a matter of law and for a new trial to determine the validity of two of MercExchange's other patents. *Id.*

85. See *id.* at 1338-39 ("To be sure, 'courts have in rare instances exercised their discretion to deny injunctive relief in order to protect the public interest.'").

86. *Id.*

87. *Id.* at 1338.

88. *Id.*

89. See *id.* at 1339.

90. See *id.* Speaking to the district court's analysis, the court noted that "[a] continuing dispute of [the] sort is not unusual in a patent case, and even absent an injunction, such a dispute would be likely to continue in the form of successive infringement actions. . . ." *Id.*

91. *Id.* (holding that there is a general presumption that once infringement is proven an injunction should be granted).

appealed to the Supreme Court, and the writ of certiorari was granted.<sup>92</sup>

### C. Supreme Court

The petition that eBay presented posed two questions: (1) whether the Federal Circuit's general rule was applied in error, and (2) whether the Court should reconsider previous decisions by the court which strongly suggested a "near automatic injunction rule."<sup>93</sup> The Court decided unanimously to vacate the decision of the Federal Circuit and remand the case back to the district court, finding that the lower courts had erred by not applying the traditional four-factor test for injunctive relief.<sup>94</sup> The majority opinion also narrowed the holding of *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, a case that upheld a patent owner's rights and contained language supporting an "automatic injunction" standard, by only acknowledging it for the proposition that "a court of equity has . . . jurisdiction to grant injunctive relief to a patent holder who has unreasonably declined to use the patent."<sup>95</sup>

Writing for the majority, Justice Thomas emphasized that the traditional four-factor framework applied equally to all claims, even those arising under the Patent Act.<sup>96</sup> The Patent Act, 35 U.S.C. § 283, provides that injunctive relief "may" be granted "in accordance with the principles of equity."<sup>97</sup> Focusing on the word "may," the Court determined that the language of the statute did not support an auto-

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92. *eBay, Inc. v. MercExchange*, 126 S. Ct. 733 (2005) (granting writ of certiorari).

93. See Tang, *supra* note 6, at 240; see generally *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 388 (2006) (deciding whether the Federal Circuit correctly applied the general rule).

94. See *eBay*, 547 U.S. at 393-94; *supra* notes 66-73 and accompanying text. The Supreme Court has historically found and overturned several cases on appeal from the Federal Circuit, eliminating bright line rules that patent holders hold so dear. See, e.g., *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007); *Gottschalk v. Benson*, 409 U.S. 63 (1972); Gary M. Hoffman & Robert L. Kinder, *Supreme Court Review Of Federal Circuit Patent Cases – Placing The Recent Scrutiny In Context and Determining If It Will Continue*, 20 DePaul J. Art, Tech. & Intell. Prop. L. 227, 239 ("In all but one patent case in the past nine years, the Supreme Court has reversed the Federal Circuit.").

95. See *eBay*, 547 U.S. at 393; *Cont'l Paper Bag Co. v. E. Paper Bag Co.*, 210 U.S. 405, 422-30 (1908) (rejecting the notion that a court of equity does not have jurisdiction to grant injunctive relief to a patent holder who refuses to practice the patent); Tang, *supra* note 6, at 240-41.

96. *eBay*, 547 U.S. at 394 ("We hold only that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised consistent with traditional principles of equity, in patent disputes no less than in other cases governed by such standards.").

97. *Id.* at 391; see 35 U.S.C. § 283 (2006) ("The several courts having jurisdiction of cases under this title may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable.").

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matic injunction rule.<sup>98</sup> All nine Justices also agreed that the “principles of equity” mentioned in the statute were the traditional principles of equity—the four-factor test for injunctive relief.<sup>99</sup> The Court continued its interpretation of the applicable statutes by acknowledging that though 35 U.S.C. § 154(a)(1) gives patent holders “the right to exclude others from making, using, offering for sale, or selling the invention,” this right to exclude alone cannot justify a general rule favoring injunctive relief.<sup>100</sup> Particularly, the Court chose to distinguish between “the creation of a right” and providing “remedies for violations of [those] rights.”<sup>101</sup>

1. Concurrence by the Chief Justice Joined by Justice Scalia and Justice Ginsburg

The Chief Justice’s concurring opinion, while agreeing that district courts should apply the traditional four factors, also stressed the importance of the history of injunctive relief in infringement claims.<sup>102</sup> The opinion asserted that “given the difficulty of protecting a right to exclude through monetary remedies,” the longstanding principle was not surprising.<sup>103</sup> The Chief Justice summed up his argument regarding the history by noting that “a page of history is worth a volume of logic.”<sup>104</sup>

2. Concurrence by Justice Kennedy joined by Justices Stevens, Souter, and Breyer

Justice Kennedy also agreed with the majority that the well established four-factor test should be applied to patent infringement claims.<sup>105</sup> However, his opinion focused on the individuality of each case noting that history will be most helpful where the “circumstances of a case bear substantial parallels to litigation the courts have con-

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98. *See eBay*, 547 U.S. at 392. The Court also supported its argument by referencing the Copyright Act and the similarities between the rights granted to copyright and patent owners. *Id.*

99. *See Tang*, *supra* note 6, at 240. *See eBay*, 547 U.S. at 391.

100. *See eBay*, 547 U.S. at 392; *see also* Millard, *supra* note 7, at 1003.

101. *See eBay*, 547 U.S. at 392.

102. *See id.* at 395 (“From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases.”).

103. *See id.*

104. *Id.*

105. *Id.* (“The Court is correct, in my view, to hold that courts should apply the well-established, four-factor test—without resort to categorical rules—in deciding whether to grant injunctive relief in patent cases.”).

fronted before.”<sup>106</sup> In reaching this conclusion, Justice Kennedy articulated his disagreement with the Chief Justice’s concurrence on the difficulty of protecting the right to exclude.<sup>107</sup> Justice Kennedy also alluded to the recent phenomenon of “patent trolls,” stating that “the economic function of patent holder[s] present[s] consideration quite unlike earlier cases.”<sup>108</sup> The opinion went on to suggest that the court system is sufficient to keep up with rapid technological advances.<sup>109</sup> In conclusion, Justice Kennedy commented that, in order for courts to adapt with the current trends, “it should be recognized that district courts must determine whether past practice fits the circumstance of the cases before them.”<sup>110</sup>

#### D. District Court After Remand

On remand, the district court allowed both parties to update the record to reflect factual changes that had occurred during the five years of litigation.<sup>111</sup> During this time period the USPTO, upon request for reexamination by eBay, found two of MercExchange’s patents to be invalid because they did not meet the non-obvious standard necessary to obtain a patent.<sup>112</sup> The Eastern District of Virginia, now applying the four-factor test as instructed by the Supreme Court, rejected MercExchange’s motion for a permanent injunction for a second time.<sup>113</sup>

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106. *Id.* at 396; *see also* Millard, *supra* note 7, at 1006.

107. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (“The traditional practice of issuing injunction against patent infringers, however, does not seem to rest on the difficulty of protecting a right to exclude through monetary remedies that allow an infringer to use an invention against the patentee’s wishes.”).

108. Though there are several definitions of the term “patent troll,” *see, e.g.*, Joe Beyers, *Perspective: Rise of the Patent Trolls*, CNET, Oct. 12, 2005, [http://news.cnet.com/Rise-of-the-patent-trolls/2010-1071\\_3-5892996.html](http://news.cnet.com/Rise-of-the-patent-trolls/2010-1071_3-5892996.html), the term is used here to describe an entity that does not practice its patents and whose business is primarily related to revenue obtained from licensing its patent portfolio. *See eBay*, 547 U.S. at 396; *see also* Millard, *supra* note 7, at 1006; J. Jason Williams et al., *Strategies for Combating Patent Trolls*, 17 J. INTELL. PROP. L. 367, 368 (2010). In his concurrence, Justice Kennedy suggested that granting injunctions to firms whose business focuses on using patents and the threat of injunctions to charge higher licensing fees, would not be best served by the issuing of an injunction. *eBay*, 547 U.S. at 396.

109. *eBay*, 547 U.S. at 397.

110. *Id.*

111. Millard, *supra* note 7, at 1007.

112. *Id.*

113. *MercExchange, L.L.C. v. eBay, Inc. (eBay III)*, 500 F. Supp. 2d 556, 559 (E.D. Va. 2007).

III. CONFUSION AMONGST THE COURTS: PRESUMING  
THE UNKNOWN—THE PRESUMPTION OF  
IRREPARABLE HARM AFTER *EBAY*

By denouncing the Federal Circuit's general rule of granting a permanent injunction once infringement is proven, the Supreme Court created confusion among the lower courts regarding the standard of proof required for preliminary injunctions.<sup>114</sup> It should be noted that preliminary injunctions are not meant to contradict the merits of a claim, and thus when the merits are clear, it is also clear that a preliminary injunction should be granted regardless of the irreparable consequences.<sup>115</sup> However, the confusion amongst courts is derived from the typical case, where the merits of the case are not immediately apparent at the beginning stages of litigation.<sup>116</sup>

While the *eBay* decision directly addressed the traditional grant of *permanent* injunctions, courts have also traditionally granted *preliminary* injunctions once a plaintiff has shown likelihood of success on the merits.<sup>117</sup> This customary grant of preliminary injunctions flowed from the courts' presumption that the harm caused by infringement is irreparable.<sup>118</sup> Has the presumption of irreparable harm survived *eBay*? Must a court now apply the traditional four-factor test to the grant of preliminary injunctions also? These issues surrounding the presumption of irreparable harm have been the object of much scholarly debate since the Supreme Court's decision in *eBay* and have yet to be resolved by the lower circuit courts.<sup>119</sup>

Much of the confusion surrounding the presumption of irreparable harm likely stems from trying to define such a malleable term. Black's Law Dictionary cites the following passage as further explanation of its definition of irreparable injury:

The term 'irreparable injury,' however, is not to be taken in its strict literal sense. The rule does not require that the threatened injury should be one not physically capable of being repaired. If the threatened injury would be substantial and serious — *one not easily*

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114. *See infra* Part IV.

115. Douglas Lichtman, *Irreparable Benefits*, 116 *YALE L.J.* 1284, 1289 (2007).

116. *Id.* at 1289. This is contrary to the clearly preposterous case of infringement where it is clear even from the pleadings that the plaintiff has infringed. *See id.*

117. David McGowan, *Irreparable Harm*, 14 *LEWIS & CLARK L. REV.* 577, 579 (2010).

118. *Id.* at 582. "If in most cases Y follows from X, then presuming Y one X is shown saves everyone time and expense." *Id.* at 582.

119. *See, e.g.*, Bernstein & Cerreta, *supra* note 17, at 55-56; McGowan, *supra* note 117, at 579; Millard, *supra* note 7, at 991; *see also* sources cited *supra* note 7, 8.

to be estimated, or repaired by money — and if the loss or inconvenience to the plaintiff if the injunction should be refused (his title proving good) would be much greater than any which can be suffered by the defendant through the granting of the injunction, although his title ultimately prevails, the case is one of such probable great or ‘irreparable’ damage as will justify a preliminary injunction.<sup>120</sup>

This definition would seem to easily encompass the right to exclude others from use, as guaranteed by the Patent, Lanham (Trademark), and Copyright Acts, as the right to exclude has always been considered not easily estimated.<sup>121</sup> However, some scholars argue that “[p]atent harms are not literally irreparable” and that “most patent-related injuries can be fully compensated by some ex post cash payment.”<sup>122</sup>

While the definition of irreparable harm may not be interpreted consistently amongst courts, the requirement that all plaintiffs must prove that standard should be consistent. If a presumption of irreparable harm exists, it is completely inconsistent with the Court’s view in *eBay*, as it creates three factors from four by allowing a showing of likelihood of success on the merits to prove another factor—irreparable harm.<sup>123</sup> Irreparable harm is a completely separate element from likelihood of success on the merits and should be treated as such in a court’s analysis of preliminary injunctive relief.<sup>124</sup>

#### IV. POST-EBAY INFRINGEMENT LITIGATION

Since *eBay*, many courts have issued opinions applying, or misapplying, the standards set forth by the Supreme Court.<sup>125</sup> These varying opinions, even in lower courts, negatively affect the judicial system. These effects create the perfect storm for forum shopping, whereby litigants search for the court with adjudged cases that are

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120. BLACK’S LAW DICTIONARY 856-57 (9th ed. 2009) (emphasis added) (citing ELIAS MERWIN, PRINCIPLES OF EQUITY AND EQUITY PLEADING 426–27 (H.C. Merwin ed., 1896)).

121. See Lichtman, *supra* note 115, at 1288 n.6 (2007) (noting that patents are usually deemed irreparable because they are difficult for courts to estimate, but that there are very limited instances where a patent harm is irreparable); *supra* notes 18-20 and accompanying text.

122. Lichtman, *supra* note 115, at 1288.

123. Pamela Samuelson & Krzysztof Bebenek, *Why Plaintiffs Should Have to Prove Irreparable Harm in Copyright Preliminary Injunction Cases*, 6 J.L. & POL’Y INFO. SOC’Y 67, 74 (2010) (“The likelihood of success on the merits and a showing of irreparable harm are two separate and independent requirements for the grant of preliminary injunctive relief, and each must be proven and analyzed separately.”).

124. See *id.*

125. See *infra* Part IV.



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most favorable to their desired outcome.<sup>126</sup> Forum shopping is frowned upon by the court system, as it disrupts the purpose of the courts by allowing plaintiffs to potentially receive an unfair advantage based on an inconsistency that should not exist.<sup>127</sup>

In the year following *eBay*, the Ninth Circuit explicitly retained the traditional approach of presuming irreparable harm once a trademark owner established a likelihood of success on the merits.<sup>128</sup> District courts in the Ninth Circuit continued to apply the presumption of irreparable harm through 2008.<sup>129</sup> In *Canfield v. Health Communications, Inc.*, the Central District of California rejected defendant's argument that *eBay* applied to trademark infringement claims.<sup>130</sup> Embracing the narrow reading of the opinion, the court concluded that the *eBay* opinion only applied to patent and copyright infringement claims.<sup>131</sup> The Ninth Circuit, however, rebuffed the presumption of irreparable harm one year later in 2009, following the Supreme Court's decision in *Winter*.<sup>132</sup>

In *Cytosport v. Vital Pharmaceuticals*, the court stated that while “[p]reviously, in trademark cases, the Ninth Circuit had held that a plaintiff was entitled to a presumption of irreparable injury . . . from a showing of likelihood of success on the merits. . . . [T]he governing law has changed. . . .”<sup>133</sup> The court went on to expressly state that a “plaintiff is not granted the presumption of irreparable harm,” making it clear that plaintiffs in the Ninth Circuit could no longer rely on the customary preliminary injunction and would now be required to show that irreparable injury is “likely in the absence of an injunction.”<sup>134</sup>

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126. Richard Maloy, *Forum Shopping? What's Wrong With That?*, 24 QUINNIPIAC L. REV. 25, 26 (2005) (explaining that state courts have also attempted to define “forum shopping,” including the California Supreme Court which has stated that forum shopping is the “practice of choosing the most favorable jurisdiction . . . in which a claim might be heard.”).

127. *Id.* The U.S. Second Circuit Court of Appeals described forum shopping as the following: “[t]he concern surrounding forum shopping stems from the fear that a plaintiff will be able to determine the outcome of a case simply by choosing the forum in which to bring the suit.” *Id.*

128. Rita W. Siamas, *Whatever “It” Is, You Can Find It in Cases Post-eBay: But Don’t Search for Guidance About Whether eBay Eliminates the Presumption of Irreparable Harm in Trademark Infringement Cases*, ORANGE COUNTY L., Aug. 2008, at 18, 19; see *Abercrombie & Fitch Co. v. Moose Creek, Inc.*, 486 F.3d 629, 633 (9th Cir. 2007) (“Irreparable injury is ordinarily presumed upon a showing of a likelihood of success.”).

129. See Siamas, *supra* note 128, at 20; see also *supra* notes 42-43 and accompanying text.

130. *Canfield v. Health Commc’ns, Inc.*, No. CV08-890SWV(JTLx), 2008 WL 971318, at \*2 (C.D. Cal. Apr. 1, 2008).

131. Siamas, *supra* note 128, at 20; see also *supra* text accompanying note 42-43.

132. See *Cytosport, Inc. v. Vital Pharm., Inc.*, 617 F. Supp. 2d 1051, 1064-65 (E.D. Cal. 2009).

133. *Id.* at 1065 (internal quotation marks omitted).

134. *Id.* (emphasis omitted) (internal quotation marks omitted); see also *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 21-22 (2008).

The court made special note of *Winter*'s distinction between an injury that is "likely" and the "possibility" of injury, where the Supreme Court stated that the latter is "inconsistent with [the Court's] characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."<sup>135</sup>

While the Ninth Circuit relied on *Winter* to eliminate the presumption of irreparable harm, the Second Circuit relied primarily on *eBay* in determining that plaintiffs must now prove irreparable harm.<sup>136</sup> In *Salinger v. Colting*, the Second Circuit held that "*eBay* applies with equal force (a) to preliminary injunctions (b) that are issue for alleged copyright infringement," and the court went on to state that "nothing in the text or the logic of *eBay* suggests that this rule is limited to patent cases."<sup>137</sup>

The District Court of Massachusetts, however, has strayed from the majority of courts who seem to be leaning towards broad application of the standard for injunctions announced in *eBay*.<sup>138</sup> In *Operation Able of Greater Boston v. National Able*, the District Court of Massachusetts held that *eBay* should be read narrowly and thus only apply to permanent injunction sought pursuant to the Patent Act.<sup>139</sup> There, the court went on to state that it would continue to apply the presumption of irreparable harm in trademark infringement claims.<sup>140</sup> This case is one of the narrowest applications of the *eBay* standard by a district court, as the court refused to apply the *eBay* holding to either copyright or trademark infringement claims for preliminary injunction.<sup>141</sup>

While several circuits have spoken directly to the scope of *eBay*, several have yet to determine whether a presumption of irreparable harm has survived.<sup>142</sup> In *North American Medical Corp. v. Axiom Worldwide, Inc.*, a case concerning the trademark of a therapeutic spi-

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135. *Winter*, 555 U.S. at 22; see *supra* text accompanying notes 42-43.

136. See generally *Salinger v. Colting*, 607 F.3d 68 (2d Cir. 2010) (holding that *eBay* abrogated the Second Circuit's earlier preliminary injunction standard and required a court to consider irreparable harm to the plaintiff); see *supra* text accompanying notes 133-35.

137. *Salinger*, 607 F.3d at 77-78.

138. See *id.* *Operation Able of Greater Bos. v. Nat'l Able Network*, 646 F. Supp. 2d 166, 176-77 (D. Mass. 2009); *Cytosport*, 617 F. Supp. 2d at 1064-65; see discussion *infra* Parts IV.A, IV.C.

139. *Operation Able*, 646 F. Supp. 2d at 176-77.

140. *Id.*

141. See discussion *infra* Part IV.

142. See generally *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211 (2008) (holding that *eBay* is applicable to the case, but refusing to opine on further effects of *eBay*).

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nal device, the Court of Appeals for the Eleventh Circuit remanded the case to the district court with instruction to consider whether *eBay* applied to trademark cases involving preliminary injunctions.<sup>143</sup> While the court expressly refused to rule on *eBay*'s application, it stated that "although *eBay* dealt with the Patent Act and with permanent injunctive relief, a strong case can be made that *eBay*'s holding necessarily extends to the grant of preliminary injunction under the Lanham Act."<sup>144</sup> The court went on to announce that there was no discernible difference between the grant for preliminary or permanent injunctive relief.<sup>145</sup> These differences could most definitely influence a plaintiff to forum shop, as the outcomes could be vastly different based on the way in which a court applies *eBay*.

A. The Court's Holding in *eBay* Eliminated the Presumption of Irreparable Harm in All Copyright Infringement Claims.

The constitutional grant for copyrights is identical to that of patents.<sup>146</sup> Congress may act to secure exclusive rights to "authors and inventors," where the term "inventors" refers to patent owners and the term "authors" to copyright owners.<sup>147</sup> Though there are many differences between copyrights and patents (namely the subject matter covered; the length of exclusive rights; and the registration process), the similarity in the constitutional grant makes them more similar than not when discussing the merits of an injunction.<sup>148</sup> Both the Copyright Act and the Patent Act give courts the power to issue relief in the form of permanent or preliminary injunctions.<sup>149</sup>

Prior to *eBay*, permanent injunctions were liberally granted, as courts had come to a general consensus that copyright interests were difficult to value, and an injunction would be the best way to make the

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143. *See id.* at 1216, 1228.

144. *Id.* at 1228.

145. *Id.* ("Furthermore, no obvious distinction exists between permanent and preliminary injunctive relief to suggest that *eBay* should not apply to the latter. Because the language of the Lanham Act—granting federal courts the power to grant injunctions 'according to the principles of equity and upon such terms as the court may deem reasonable'—is so similar to the language of the Patent Act, we conclude that the Supreme Court's *eBay* case is applicable to the instant case.").

146. *See supra* note 5 *infra* text accompanying note 147.

147. *See id.*; *see also* Jonathan Hudis et al., Feature, *Why Trademark and Copyright Counsel Should Heed the Patent Precedent of the Supreme Court*, *LANDSLIDE*, Nov./Dec. 2009, at 15, 21.

148. Hudis et al., *supra* note 147, at 21.

149. *See* 35 U.S.C. § 283 (2006); *supra* text accompanying note 35.

copyright owner whole.<sup>150</sup> At that time, courts frequently presumed irreparable harm upon a showing of liability.<sup>151</sup> Post *eBay*, however, several courts have applied *eBay* to copyright infringement cases where the plaintiff seeks a permanent injunction.<sup>152</sup>

In the year following the *eBay* decision, the Court of Appeals for the Fourth Circuit in *Christopher Phelps & Associates, LLC v. Galloway* rejected plaintiff's argument that following a showing of actual infringement and a threat of continuing infringement, it was entitled to injunctive relief.<sup>153</sup> The case involved infringement of architectural designs, which the defendant used to build his retirement home.<sup>154</sup> Citing *eBay*, the court concluded that plaintiffs in copyright infringement suits must satisfy the traditional four-factor test.<sup>155</sup> The court found that the first two *eBay* factors, irreparable harm and inadequacy of monetary relief, had most likely been demonstrated.<sup>156</sup> However, the court stated that in analyzing the other two factors, balance of hardships and the public interest, plaintiff had "fallen short."<sup>157</sup> Because the defendant had finished building his retirement home, the balance of hardships weighed in his favor, and enjoining future leasing of the property would not serve the public interest because it prevented the free alienability of property; this factor also weighed in favor of the defendant.<sup>158</sup> The court thus declined to issue a permanent injunction in this copyright infringement claim based on its application of the *eBay* factors.<sup>159</sup>

The United States District for the Central District of California similarly applied *eBay* in a claim for copyright infringement of sound

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150. Jacqueline C. Charlesworth & Erin Herlihy, Feature, *Bidding for a Copyright Injunction After eBay*, LANDSLIDE, May/June 2009, at 30.

151. *Id.*

152. *See infra* notes 154-66 and accompanying text. *But see* *Gener-Villar v. Adcom Grp., Inc.*, 560 F. Supp. 2d 112, 137-38 (D.P.R. 2008); *Capitol Records, Inc. v. Zahn*, No. 3:06-0212, 2007 U.S. Dist. LEXIS 11426, at \*10-12 (M.D. Tenn. Feb. 16, 2007) (presuming irreparable injury and granting a permanent injunction).

153. *Christopher Phelps & Assocs., LLC v. Galloway*, 492 F.3d 532, 543 (4th Cir. 2007).

154. *See id.* at 535.

155. *Id.* at 543 ("In *eBay*, the Supreme Court rejected any notion that 'an injunction automatically follows a determination that a copyright has been infringed.'").

156. *Id.* at 544.

157. *Id.*

158. *See id.* at 544-45.

159. *Id.* at 546 ("While granting an injunction to destroy an infringing article might be usual with respect to personal property, especially in the garden-variety music or movie piracy case, refusing to order destruction or the inalienability of property is also consistent with the Copyright Act's remedial scheme. . . .").

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recordings.<sup>160</sup> *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, involved a request for a permanent injunction after summary judgment was granted to the plaintiffs, after a clear showing of infringement.<sup>161</sup> There, plaintiffs sought to use the pre-*eBay* standard, much like the plaintiffs in *Galloway*.<sup>162</sup> Plaintiffs argued that the court should apply a more permissive standard injunction test, whereby injunctive relief will be granted upon a showing of past infringement and a likelihood of future infringement.<sup>163</sup> The court declined to follow this standard, stating, “this Court has doubts that [the] ‘general rule’ regarding permanent injunction survives *eBay*.”<sup>164</sup> After applying the *eBay* standard, the court found that plaintiffs had proven all four factors.<sup>165</sup>

The District Court of Hawaii, the Middle District of North Carolina, the Southern District of Ohio, the District of Maryland, and the Western District of Louisiana have also applied *eBay* to copyright infringement claims where the plaintiff seeks a permanent injunction.<sup>166</sup> However, at least two district courts have declined to apply *eBay* to copyright infringement matters that involve a motion for permanent injunction.<sup>167</sup>

While several courts have recognized that there is no longer a presumption of irreparable harm in copyright cases involving *permanent* injunctions, there are far fewer courts that have required proof of irreparable harm where a party seeks a *preliminary* injunction.<sup>168</sup>

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160. See generally *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197 (C.D. Cal. 2007) (examining and applying *eBay* to copyright case concerning “leaked” sound recordings).

161. *Id.* at 1201.

162. See *id.* at 1209; *c.f. supra* text accompanying notes 154-59.

163. See *Metro-Goldwyn-Mayer Studios Inc.*, 518 F. Supp. 2d at 1209. “Based on *eBay* . . . there is not language in the text of the Copyright Act that would permit a departure from traditional equitable principles such that a presumption of irreparable harm would be allowed in any injunctive context.” *Id.* at 1214 (Roberts, C.J., concurring).

164. *Id.*

165. *Id.* at 1214-22.

166. See *Charlesworth & Herlihy*, *supra* note 150, at 32.

167. *Id.*; see also *Gener-Villar v. Adcom Grp., Inc.*, 560 F. Supp. 2d 112, 133 (D.P.R. 2008); *Capitol Records, Inc. v. Zahn*, No. 3:06-0212, 2007 U.S. Dist. LEXIS 11426 \*3 (M.D. Tenn. Feb. 16, 2007).

168. See *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 316, 319 (S.D.N.Y. 2008); *Photo Res. Hawai'i, Inc. v. Am. Hawai'i Travel, Inc.*, NO. 07-00134 DAE-LEK, 2007 U.S. Dist. LEXIS 91729, at \*12-14 (D. Haw. Dec. 12, 2007) (magistrate's finding and recommendations), *adopted*, 2008 U.S. Dist. LEXIS 125 (D. Haw. Jan. 2, 2008); *Nat'l League of Junior Cotillions, Inc. (Cotillions) v. Porter*, No. 3:06-cv-508-RJC, 2007 U.S. Dist. LEXIS 58117, at \*18-19, 21 (W.D.N.C. Aug. 9, 2007), *aff'd*, 2008 U.S. App. LEXIS 12138 (4th Cir. June 6, 2008); *Allora, L.L.C. v. Brownstone, Inc.*, No. 1:07CV87, 2007 U.S. Dist. LEXIS 31343, at \*16 (W.D.N.C. Apr. 27, 2007).

Courts still apply the presumption of irreparable harm, ignoring *eBay* by distinguishing either preliminary and permanent injunctive relief or patent and copyright.<sup>169</sup> The District Court for the Western District of North Carolina chose the former in 2007.<sup>170</sup> The court, in ruling on a claim for copyright and trademark infringement, found that although others had suggested that *eBay* eliminated the presumption of irreparable harm in all intellectual property matters, that *eBay* and other cases which had applied the four-factor test in the copyright context all involved permanent injunctions.<sup>171</sup> The court explained that those cases “came after a full trial . . . [and thus] apply only to permanent injunction.”<sup>172</sup> Though the court’s statement could be read as rejecting the application of *eBay* in this context, the court went on to state, “while the Court here cites the presumption, it does not rest any conclusion that the plaintiff has suffered irreparable harm solely on the presumption.”<sup>173</sup> The Western District of North Carolina was not the only court to suggest that the presumption of irreparable harm was still applicable, but then choose to analyze the facts as if the plaintiff was still required to prove irreparable harm.<sup>174</sup>

Conversely, in *Salinger v. Colting*, the Court of Appeals for the Second Circuit found that *eBay* did eliminate the presumption of irreparable harm in copyright infringement claims where the plaintiff seeks a preliminary injunction.<sup>175</sup> The court found that “[t]his Court’s pre-*eBay* standard for when preliminary injunctions may issue in copyright cases is inconsistent with the principles of equity set forth in *eBay*.”<sup>176</sup> Accordingly, the court went on to discuss each of the four factors announced in *eBay*, including irreparable harm.<sup>177</sup> In its analysis, the court stated:

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169. See *infra* notes 171-83 and accompanying text.

170. See *Cotillions*, 2007 U.S. Dist. LEXIS 58117 at \*18-21.

171. *Id.* at \*18-19.

172. *Id.* at \*19.

173. *Id.* at \*21.

174. See generally *Wireless TV Studios v. Digital Dispatch Sys., Inc.*, No. 07 CV 5103, 2008 U.S. Dist. LEXIS 47620 (E.D.N.Y. June 19, 2008) (citing *eBay* for the proposition that measuring damages “fail[s] to address the traditional equitable consideration governing a request for injunctive relief.”)

175. See *Salinger v. Colting*, 607 F.3d 68, 79-82 (2d Cir. 2010). The Second Circuit is one of the most influential circuits regarding intellectual property matters due to the relatively high number of entertainment and publishing houses located within its jurisdiction; thus this ruling will likely be important in future copyright infringement cases.

176. *Id.* at 79.

177. *Id.* at 79-80.

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[C]ourts must not simply presume irreparable harm. Rather, plaintiffs must show that, on the facts of their case, the failure to issue an injunction would actually cause irreparable harm. This is not to say that most copyright plaintiffs who have shown a likelihood of success on the merits would not be irreparably harmed absent preliminary injunctive relief. As an empirical matter, that may well be the case, and the historical tendency to issue preliminary injunctions readily in copyright cases may reflect just that.<sup>178</sup>

The court concluded by referencing language from the majority and concurring opinions of *eBay*, which suggested that trends and tendencies should not be the standard by which we judge cases.<sup>179</sup>

The *eBay* logic—and thus the *Salinger* logic—was applied even more recently in *CJ Product LLC v. Concord Toys International, Inc.*, a case involving copyright infringement of the popular 2003 toy, “Pillow Pet.”<sup>180</sup> This case involved clear infringement; however, the court still refused to presume irreparable harm, citing both *eBay* and *Salinger*.<sup>181</sup> The court reasoned that while monetary loss alone was insufficient, the defendant’s selling of an identical product which may have caused potential health risks was damaging to plaintiffs reputation, highly likely to confuse consumers, thus could not be redressed by any other legal remedy.<sup>182</sup>

The *Salinger* court’s approach to the issuance of permanent injunction in cases arising out of copyright infringement is the appropriate analysis and should be adopted by all other circuits in light of *eBay* and to resolve the split among the circuits on the issue. The Eastern District of New York, in the *Pillow Pet* case, under the *Salinger* approach would have erred had it relied solely on the presumption of the irreparable harm and not analyzed the record for proof of irreparable harm.<sup>183</sup> The standard announced in *eBay* clearly is not confined to the context of patents, as the constitutional grant of power

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178. *Id.* at 82 (citation omitted).

179. *Id.* at 82 (“Although the ‘lesson of the historical practice . . . is most helpful and instructive when the circumstances of the case bear substantial parallels to litigation the courts have confronted before[.] . . . in many instances the nature of the patent being enforced and the economic function of the patent holder present consideration quite unlike earlier cases.’”).

180. *See generally* *CJ Prods. v. Concord Toys Int’l*, No. 10-CV-5712, 2011 U.S. Dist. LEXIS 4983, \*1 (E.D.N.Y. 2011) (granting plaintiff’s request for preliminary injunction).

181. *Id.* at \*4 (“[E]ven though plaintiffs have shown a substantial likelihood of success on the merits, the Court must still analyze the request for a preliminary injunction by applying the four-factor test of *eBay* and *Salinger*.”).

182. *Id.* at \*4.

183. *C.f. supra* text accompanying note 176.

flows from the same clause.<sup>184</sup> Since copyrights and patents are so closely related by the exclusive monopolies granted to authors and inventors, it follows that *eBay* should be applied to both patent and copyright cases. This logic lends to the four-factor *eBay* test being applied in copyright infringement cases where the relief sought is either a preliminary or permanent injunction. As stated earlier, the standard for preliminary and permanent injunction is also too closely related for the *eBay* Court's opinion to be limited to permanent injunctions in any context.

B. The Court's Holding in *eBay* Eliminated the Presumption of Irreparable Harm in All Trademark Infringement Claims

Courts in general have applied a presumption of irreparable harm in copyright infringement claims.<sup>185</sup> However, since *eBay*, many courts have questioned whether this presumption has survived in the context of trademark infringement claims.<sup>186</sup> While several courts have been open to applying the Court's holding in *eBay* to patent infringement claims for preliminary injunctions and copyright infringement claims for permanent injunctions, courts have shown the most resistance to applying *eBay*'s reasoning to trademark infringement claims.<sup>187</sup> Several intellectual property experts and commentators have commented on this issue, most notably Professor J. Thomas McCarthy,<sup>188</sup> Professor Sandra Rierson,<sup>189</sup> and David H. Bernstein<sup>190</sup>—all leaders and experts in the field of trademarks.

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184. See *supra* text accompanying notes 6, 147-48.

185. See Bernstein & Cerreta, *supra* note 17, at 55; see *supra* text accompanying notes 128-32.

186. See Bernstein & Cerreta, *supra* note 17, at 55 (Many courts also considered the viability of this presumption after *Winter*).

187. *Id.*

188. Thomas McCarthy is a senior professor at University of San Francisco School of Law. *J. Thomas McCarthy*, USF SCH. OF L., [http://www.usfca.edu/law/faculty/thomas\\_mccarthy/](http://www.usfca.edu/law/faculty/thomas_mccarthy/) (last visited Feb. 25, 2012).

He is the author of the Thomson-Reuters-West treatises: McCarthy on Trademarks and Unfair Competition; and The Rights of Publicity and Privacy. McCarthy is also the founding director of USF's McCarthy Institute for Intellectual Property and Technology Law, which is named in his honor. He was the recipient of the 2003 President's Award of the International Trademark Association, the 2000 Pattishall Medal for excellence in teaching trademark law from the Brand Names Education Foundation, the 1997 Ladas Professional Author Award from the Brand Names Education Foundation, the 1997 Centennial Award in Trademark Law from the American Intellectual Property Law Association, the 1994 Jefferson Medal from the New Jersey Intellectual Property Law Association, the 1979 Rossman Award of the Patent and Trademark Office Society, and the 1965 Watson Award of the American Intellectual Property Law Association. The American Intellectual Property Lawyers Association named Professor McCarthy "the most influential trademark expert of the 20th century."

*Id.*



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Professor McCarthy argues that the presumption of irreparable harm still applies in trademark matters because of the inherent difference between the harm caused by infringement in trademark claims, and that in copyright and patent claims.<sup>191</sup> He concludes that the logic applied in *eBay* to patent infringement claims should not be extended to trademark infringement.<sup>192</sup> Bernstein develops McCarthy's conclusion by explaining the allegedly inherent differences between irreparable harm in trademark infringement claims and irreparable harm created in copyright and patent claims.<sup>193</sup>

According to Bernstein, the harm to trademark owners and the public are more "inappropriately remedied via monetary relief" because a trademark "embodies a relationship between (1) a particular set of goods and services, (2) a particular source of those goods and services, and (3) a series of attributes and qualities constituting good will," and that these relationships are severed by trademark infringement.<sup>194</sup> He goes on to relate this severed relationship to a direct harm to the public interest due to the increased search costs in trying to differentiate products by some other means separate from simple trademark identification, which is greatly diminished by infringement.<sup>195</sup> Bernstein argues that this harm is fundamentally reputational and thus difficult to quantify.<sup>196</sup> In contrast, he argues that the

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189. Sandra Rierson is an Assistant Professor at Thomas Jefferson School of Law. *Sandra L. Rierson*, THOMAS JEFFERSON SCH. OF L. SAN DIEGO, <http://www.tjssl.edu/directory/sandra-rierson> (last visited February 25, 2012).

Professor Rierson joined the Thomas Jefferson School of Law faculty in the fall of 2002. After graduating from law school, where she was the symposium editor of the *Yale Law Journal*, she clerked for the Honorable Richard A. Gadbois, in the U.S. District Court in Los Angeles. Professor Rierson subsequently practiced law with Quinn Emanuel Urquhart & Sullivan, also in Los Angeles, where she became a partner in 1998. Her litigation practice focused on intellectual property and employment law, government contracts and general business disputes. She also has taught at the University of San Diego School of Law. Professor Rierson's scholarship is in the areas of intellectual property, legal history and women's history, and civil procedure.

*Id.*

190. See David H. Bernstein & Andrew Gilden, *No Trolls Barred: Trademark Injunctions After eBay*, 99 TRADEMARK REP. 1037, 111 n.\* (2009).

David H. Bernstein is a Partner at Debevoise & Plimpton LLP, New York; immediate-past counsel to the International Trademark Association ("INTA"). Mr. Bernstein is also an Adjunct Professor of Law at George Washington University Law School and an active domain name panelist and/or arbitrator with the World Intellectual Property Organization.

191. *Id.* at 1037.

192. *Id.*

193. *Id.*

194. *Id.* at 1038.

195. *Id.*

196. *Id.* at 1053 (arguing that because trademarks are meant to identify a source of goods, confusing consumers by infringement causes the trademark owner to lose its ability to signify

harm in patent and copyright infringement is monetary in nature and simply results in a loss of market share for the patented invention or copyrighted work.<sup>197</sup> While recognizing that the public interest would also be harmed if patent and copyright owners were unable to protect their right to exclude, he notes that the need to balance the public and private interest in patent and copyright claims is more prevalent than in the trademark context.<sup>198</sup> Bernstein finds a foundation for this argument by focusing on “patent trolls” and the fair use doctrine.<sup>199</sup> In such instances, he argues that the presumption of irreparable harm is both economically inefficient and penalizes socially beneficial activity.<sup>200</sup>

Bernstein also argues several weaker points, discussing the difference in perpetual exclusivity afforded to trademarks as opposed to the time limits of protection copyrights and patents receive.<sup>201</sup> He makes an illogical leap by concluding that because there are several cases in which a court required a showing of irreparable harm, and it was found, that this statistical probability alone is sufficient to support a presumption of irreparable harm in trademark cases.<sup>202</sup> Following this reasoning, it would also be true that X, a patent owner who has won several infringement claims, should not bear the burden of proof in future infringement claims, as X has already shown that he can prove a case.<sup>203</sup> This logic, of course, is not supported by the history of our court system, much like Bernstein’s reasoning that because irreparable harm has been easily proven in several cases, it should be presumed in all cases.<sup>204</sup> This is a fallacy.

Conversely, Professor Rierson asserts that the presumption of irreparable harm should not be employed in trademark infringement claims, she views the presumption as giving trademarks unwarranted

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that is the sole source of the product and control the public’s experience in relation to the product).

197. *Id.* at 1053-54.

198. *Id.*

199. *Id.* at 1057.

200. *Id.* at 1058-59. Fair use as a reasonable and limited use of a copyrighted work without the author’s permission serves as a defense to an infringement claim, depending on the purpose and character of the use, the nature of the copyrighted work, and the amount of the work used. 17 U.S.C.A. § 107 (2006).

201. Bernstein & Gildea, *supra* note 191, at 1057-58.

202. *Id.* (“The inapplicability of *eBay* to trademark cases is perhaps best demonstrated by those post-*eBay* trademark cases that have explicitly addressed a plaintiff’s evidence of irreparable harm after finding a likelihood of confusion.”).

203. See McGowan, *supra* note 117, at 580.

204. See text accompanying notes 198-203.

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protection.<sup>205</sup> Professor Rierson's argument has three central components.<sup>206</sup> First, she directly refutes McCarthy and Bernstein's argument that the inherent distinctions of trademarks make it more appropriate to apply a presumption of irreparable harm.<sup>207</sup> Rierson provides commentary on the distinctions between patents, copyrights, and trademarks to illustrate the notion that patents and copyrights have traditionally been afforded more protection than trademarks, if no presumption exists in those contexts then it only follows that it cannot exist in trademark claims.<sup>208</sup> Most notably, she looks to the historical notion that patents are considered "property" while trademarks do not share this label.<sup>209</sup> While a patent fundamentally includes the right to exclude others from use, trademarks only confer this right to exclude when there is a likelihood of confusion.<sup>210</sup> This distinction should not be taken lightly, as the right to exclude has always been considered a cornerstone of our nation's jurisprudence.<sup>211</sup>

As to Bernstein's notion of perpetuity in trademark law, the fact that a trademark owner's rights may be perpetual supports the premise that trademarks are not given the same rights as patents and copyrights, both of which have time limits on the right to exclude.<sup>212</sup> It would seem to offend the spirit of the rights given by the Constitution if the rights afforded to patents and copyrights could exist perpetually. Thus, it can be reasonably assumed, that because the rights of trademark owners can last perpetually, the right to exclude afforded to trademarks are less than those conferred to patent and copyright owners.

Rierson also argues that, contrary to popular belief, trademark harm may be quantified.<sup>213</sup> Though not an easy task, "courts should not accept without question the notion that the trademark holder's

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205. See Sandra Rierson, *IP Remedies After eBay: Assessing the Impact on Trademark Law*, 2 AKRON INTELL. PROP. L.J. 163, 165 (2008) (stating that applying the holding in *eBay* to trademark law "would be an improvement over the status quo").

206. See *id.*

207. *Id.* at 169-70.

208. *Id.* ("[P]atent and copyright law grant the holder of the intellectual property a greater degree of dominion over it than is present in trademark law, for a shorter period of time.")

209. *Id.* at 170; see Alan Devlin, *Indeterminism and the Property-Patent Equation*, 28 YALE L. & POL'Y REV. 61, 62-63 (2009) (discussing the parallels between property law and patent law).

210. Rierson, *supra* note 205, at 170.

211. *Id.* at 170-71; see *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 393 (2006) (Roberts, J., concurring) (suggesting that the only way to protect a right to exclude is through an injunction).

212. Rierson, *supra* note 205, at 170.

213. *Id.* at 174.

goodwill is so ethereal and intangible that damage done to it via infringement is simply incalculable.”<sup>214</sup> Rierson looked to the values produced when “goodwill” or reputation needs to be quantified; for instance, in a bankruptcy action, courts should not be so quick to consider the harm to “goodwill” to be irreparable because it is so difficult to calculate.<sup>215</sup> In short, Rierson concluded that “companies benefitting from goodwill . . . as a tangible asset . . . should not be allowed to skirt the requirements for proving injunctive relief, solely on the theory that they cannot place a price tag on their goodwill.”<sup>216</sup>

Quantifying anything that is not clearly associated with a cost, loss, or profit may be difficult, as discussed by Professor Rierson, but this does not mean that all claims should be treated equally.<sup>217</sup> Applying a presumption of irreparable harm ultimately assumes that no value can be given to any form of trademark infringement. This argument is unfounded because the area of trademark infringement has been greatly expanded to allow trademark owners to make out claims against users of marks that are not likely to cause consumer confusion.<sup>218</sup> Recent expansion of trademark owner’s rights in this way strengthens the argument for applying *eBay* by applying equity principles so as not to award a party unwarrantedly. If courts allow trademark owners to enforce their rights in this broader sense, like those of patent owners, it only follows that they should be required to make the same showing of proof of irreparable harm as mandated by the Court in *eBay*.

Rierson also evaluates how the presumption of irreparable harm affects a court’s analysis of the remaining three traditional factors to support her argument as to why *eBay* should be read to eliminate the presumption of irreparable harm.<sup>219</sup> She finds that it is an atypical situation where a court finds the presumption of irreparable harm to be outweighed by the second traditional factor in the four-factor injunction standard, the potential harm to the defendant.<sup>220</sup> The small amount of attention given to this issue would be more reasonable if plaintiffs were required to prove irreparable harm; however, where it

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214. *Id.*

215. *Id.* at 174-75.

216. *Id.* at 175.

217. *Id.*

218. *Id.* For instance “‘initial interest confusion,’ where there is no confusion at the point of sale, [thus] the level of actual injury to the trademark holder is likely to be negligible.” *Id.*

219. *Id.* at 177-82.

220. *Id.* at 177.

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is presumed, courts, by not carefully analyzing the other factors, make the presumption even more problematic. This reasoning also applies to the public's interest in granting the injunction, another traditional factor.

Courts traditionally presume that the public's interest will be served by granting an injunction where a plaintiff has shown a likelihood of success on the merits.<sup>221</sup> It follows that by showing a likelihood of success on the merits, a court will presume irreparable harm, will give little weight to the balance of hardships, and presume that the public's interests will be served by the injunction. This is counter to a cornerstone of our nation's jurisprudence—due process. This logic allows for no proof on the part of the plaintiff, but simply a showing of likelihood of success on the merits. If the presumption of irreparable harm is applicable in trademark claims, a plaintiff need only show a likelihood of success on the merits and three of the four factors of the traditional four-factor analysis will be presumed, which may, in many instances, lead to the issuance of an unwarranted injunction.

#### C. The Courts Holding in *eBay* Eliminated the Presumption of Irreparable Harm in All Patent Infringement Claims

It is clear that *eBay* has foreclosed the presumption of irreparable harm in patent infringement claims where the plaintiff requests a *permanent* injunction; however, some courts have still refused to apply the holding to patent cases involving *preliminary* injunctions.<sup>222</sup> The District Court for the Middle District of Tennessee, Nashville Division, held—shortly after *eBay* was decided—that “having established the first factor of likelihood of success on the merits through a ‘clear showing’ of both patent validity and infringement, the plaintiff was entitled to a presumption of [irreparable] harm.”<sup>223</sup> The Court opined that the presumption simply shifts the burden of proof to the alleged infringer.<sup>224</sup> The case there involved infringement of a new and inno-

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221. *Id.* at 180. There is also a presumption by many courts that consumers also benefit from the issuance of injunctive relief. S. REP. NO. 1333, at 3 (1946) (discussing the history of the Lanham Act).

222. *See infra* notes 224-31 and accompanying text.

223. PHG Techs. v. Timemed Labeling Sys., No. 3:05-1091, 2006 U.S. Dist. LEXIS 66828, at \*56 (M.D. Tenn. 2006).

224. *Id.* at \*56 (“Th[e] presumption [of irreparable harm] acts as a procedural device ‘which places the ultimate burden of production on the question of irreparable harm on to the alleged infringer.’”).

vative system and method of medical patient labeling.<sup>225</sup> Defendants did not rebut the presumption, and the court ultimately awarded plaintiffs the preliminary injunction.<sup>226</sup>

Similarly, in *Christian Industries v. Empire Electronics, Inc.*, the District Court for the Eastern District of Michigan held, even after referencing *eBay*, that it “did not invalidate the presumption.”<sup>227</sup> After stating this however, the court went on to quote language from *eBay* and conclude that they in fact had done precisely what the Supreme Court had suggested in regards to the four-factor test.<sup>228</sup> This case, as unclear as it may be, is representative of the confusion among the courts in applying *eBay* to preliminary injunctions. However, while there is still some confusion, it is far less in the context of patent law than in trademark and copyrights infringement law.<sup>229</sup> Though direction from the Federal Circuit may not be completely clear, the majority of district courts that have analyzed this issue directly have held that *eBay* does in fact eliminate the presumption of irreparable harm in preliminary injunction cases involving patents.<sup>230</sup>

Preliminary injunctions do not determine the rights of the parties, as the merits of the case are still to be decided; they simply seek to maintain the status quo—or the last uncontested position of each party—and protect the moving party from any further injury during the trial period.<sup>231</sup> However, a preliminary injunction will frequently end the dispute, as it more than likely will force the defendant to terminate its allegedly infringing business activities and likely source of income.<sup>232</sup> Based on this typical chain of events, it is clear that preliminary injunctions play a much more significant role in litigation and therefore should be treated as an even more extraordinary remedy. An error in awarding a preliminary injunction may not only create irreparable harm for plaintiffs, but it may also confer underserved ir-

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225. *Id.* at \*4-5.

226. *Id.* at \*57, 61-62.

227. *Christina Indus. v. Empire Elecs., Inc.*, 443 F. Supp. 2d 870, 884 (E.D. Mich. 2006).

228. *Id.* at 884.

229. *See supra* Part IV.A-B.

230. *See, e.g.*, *Precision Automation, Inc. v. Technical Servs., Inc.*, 2007 WL 4480739 at \*3 (D. Or. 2007); *Tiber Labs. LLC v. Hawthorn Pharms., Inc.*, 527 F. Supp. 2d 1373, 1380 (N.D. Ga. 2007); *Sun Optics, Inc. v. FGX Int'l Inc.*, 2007 WL 2228569 at \*1 (D. Del. 2007).

231. *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1071 (10th Cir. 2009) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

232. *Toro Co. v. Textron, Inc.*, 703 F.Supp. 417, 419, 5 U.S.P.Q.2d 1616, 1618 (W.D.N.C.1987) (“the preliminary injunction carries more importance than in other cases”); David V. Radack, *Injunctions in Patent Infringement Cases*, JOM, Dec. 1997, at 56, <http://www.tms.org/pubs/journals/jom/matters/matters-9712.html>.

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reparable benefits upon defendants by allowing them to continue their infringing behavior throughout the course of trial.<sup>233</sup>

The argument that *eBay* only applies to permanent injunctions can also be abrogated by dissecting the Court's opinion. As discussed by the Second Circuit in *Salinger*, the majority opinion in *eBay* relied heavily upon the reasoning of *Amoco Production Co. v. Village of Gambell*, a case involving a preliminary injunction.<sup>234</sup> It seems rather unlikely that if the Court intended for the holding in *eBay* to only apply to permanent injunctions that one of the two cases cited to articulate the traditional equitable principles would have been a claim involving a preliminary injunction.<sup>235</sup>

Most recently, however, the Federal Circuit has ended any and all confusion by clearly stating in the October 2011 case of *Robert Bosch LLC v. Pylon Manufacturing Corp.*, that *eBay* "jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief."<sup>236</sup> *Bosch* was an appeal from a denial of a permanent injunction in a patent infringement case.<sup>237</sup> After the lower court determined that Pylon infringed two of the patents in question, it denied Bosch's motion for permanent injunction on the grounds that it failed to prove irreparable harm.<sup>238</sup> The Federal Circuit reversed, finding that, upon proper application of the four factors, Bosch was entitled to a permanent injunction.<sup>239</sup> The court in dicta discussed its logic in applying *eBay* to preliminary injunctions:

Although *eBay* abolishes our general rule that an injunction normally will issue when a patent is found to have been valid and infringed, it does not swing the pendulum in the opposite direction. In other words, even though a successful patent infringement plaintiff can no longer rely on presumptions or other short-cuts to support a request for a permanent injunction, it does not follow that courts should entirely ignore the fundamental nature of patents as property rights granting the owner the right to exclude.<sup>240</sup>

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233. See generally Douglas Lichtman, *Irreparable Benefits*, 116 YALE L.J. 1284, 1289 (2007) (discussing the irreparable benefits that accrues to the defendant when the court refuses to enjoin the defendant).

234. *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 542 (1987); *Salinger v. Colting*, 607 F.3d 68, 78 (2d Cir. 2010).

235. See *Salinger*, 607 F.3d at 78 (recognizing that the Court in *eBay* relied upon a case involving a preliminary injunction).

236. *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed. Cir. 2011).

237. *Id.* at 1145.

238. *Id.*

239. *Id.* at 1155.

240. *Id.* at 1149.

Application of the traditional four-factor standard in *Winter* and *Bosch* reinforces the idea that the Court intended for the scope of *eBay* to reach preliminary injunctions. Like the *Salinger* court's finding, it should now be clear that "pre-*eBay* standard for when preliminary injunction may issue . . . is inconsistent with the principles of equity set forth in *eBay*."<sup>241</sup> Confusion among lower courts should be lessened, at least in patent cases, by the Court's clear elimination of the presumption in *Bosch*.<sup>242</sup>

### CONCLUSION

Patents, copyrights, and trademarks can all be valuable to a company. Like Apple Inc., some may even conclude that the three together are priceless.<sup>243</sup> Though their value may be difficult to calculate, especially for large corporations, this should not lead to a presumption of irreparable harm. Sometimes certainly a monetary award could adequately compensate the plaintiff. While traditionally the court may have come to presume that, by the nature of the property and the infringement, irreparable harm could be presumed, the Court in *eBay* directly foreclosed this presumption in patent cases.<sup>244</sup>

After *eBay*, courts should not only apply the traditional four-factor test for injunctive relief in patent cases, but this logic should also be extended to copyright and trademark infringement claims. Copyright and trademark laws guarantee an exclusive right to use, similar to that of patents.<sup>245</sup> The rights granted to a patent, copyright, or trademark owner are so closely related that any difference in the standard for injunctive relief would prove to be unjust.

Similarly, it is clear after the Court's opinion in *eBay* that a plaintiff is required to prove irreparable harm, as one of the traditional four-factors of equity, in order for a permanent injunction to be granted in a claim for patent infringement.<sup>246</sup> While this is clear, several courts disagree on the scope of *eBay* in regards to the grant of preliminary injunctions. Limiting the scope of *eBay* in this way, however, is unsupported by logic. Because the standards for preliminary

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241. *Salinger v. Colting*, 607 F.3d 68, 78 (2d Cir. 2010).

242. *Bosch*, 659 F.3d at 1149.

243. *See supra* Introduction.

244. *See eBay, Inc. v. Mercexchange, L.L.C.*, 547 U.S. 388, 393-94 (2006).

245. *See supra* text accompanying notes 18-20.

246. *See eBay*, 547 U.S. at 391 (listing the factors that the court considers for awarding a permanent injunction).



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and permanent injunctions are essentially the same, the standard to prove each should also be the same.

The Supreme Court as an institution most often issues opinions that though case specific, can be easily applied to factually similar cases. The Author believes this to be true in regards to the “patent troll” issue, which Justice Kennedy discussed in his concurring opinion in *eBay*.<sup>247</sup> By requiring all plaintiffs in all infringement claims to prove irreparable harm, the Court has ensured that defendants involved in “patent troll” or similar type litigation will be protected from being enjoined unnecessarily.

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247. *Id.* at 396 (Kennedy, J., concurring).

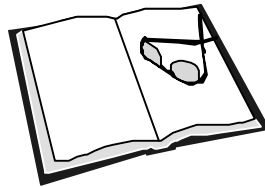


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